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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

MARK EILRICH,
Petitioner,

VS.

BERNARD J. REMAS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does an unreviewed determination of a city hearing officer bar a federal district court from independently deciding the legal question whether speech by a public employee on a matter of public concern is protected by the First Amendment?

2. Was a city hearing officer's determination that each individual statement made by a public official was not protected by the First Amendment identical with the legal issues raised in petitioner's 42 U.S.C. § 1983 action so as to require application of the doctrine of collateral estoppel?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Mark Eilrich and the respondents Bernard J. Remas, Charles Neal, Sherman Porter, Ray Safreno, Philip Overholtzer, David White, Gene Robirds, and the City of Riverbank, California. The parties in this Court are the same.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

MARK EILRICH, Petitioner,

v.

BERNARD J. REMAS, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Mark Eilrich respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this matter on February 17, 1988.[1]

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[1] Petitioner does not urge the second question presented as a reason for granting the writ, but he seeks to reserve the issue for resolution.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 839 F. 2d 630. It is reprinted beginning at page 1 in the Appendix to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 17, 1988. No petition for rehearing was filed. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Const., Amend. I:

Congress shall make no law respecting an establishment of religion,

or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition Government for a redress of grievances.

Title 42 U.S.C. § 1983 (1982):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia

shall be considered to a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Mark Eilrich, was a police officer employed by the respondent, City of Riverbank, California.[2] As secretary-treasurer of the Riverbank Police Officers' Association he read a statement to the city council during the public business portion of its meeting on November 13, 1984. (C.R. 32, Exhibit B; Excerpt at 77.)[3] The speech was critical of

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[2] Respondent Remas was the chief of police, respondent Robirds was the city administrator, and the remaining respondents were each members of the City of Riverbank city council.

[3] Throughout this Petition the Clerk's Record is referred to by number of document as "C.R. "The Excerpt of Record filed with the Court of Appeals is referred to as "Excerpt."

respondent Remas, the Chief of Police, and concerned an ongoing dispute between the Association and chief Remas, including a unanimous "no confidence" vote by the members of the police association and alleged wrongdoing by the chief. (C.R. 32, Exhibit B, Excerpt at 79; C.R. 40, Exhibit A, Excerpt at 272.) The speech resulted in petitioner's termination from the police department on November 21, 1984. (C.R. 1, Exhibit A, Excerpt at 11-13; C.R. 32, Exhibit A, Excerpt 63-65.)

The statement read to the council included the following individual comments which were the basis for the discharge:

> 1. "Chief Remas has recently commented in the local news media, in response to our publicly made unanimous 'no confidence' vote of his ... management practices, that it is his belief that the

Riverbank Police Department is currently 'strong and viable' as an organization. It is our equally strong belief, as the actual members of the organization which he is describing, that his contention is simply false."

2. "Over the past several years it has been the policy of the Chief of Police to cause dismissal of traffic citations in the interest of justice."

3. "This practice is an unethical use of the Chief's power for his own personal or political purposes."

4. "There's been a misappropriation of public funds or time by favored members of the Police Department and although this was brought to the attention of the Chief of Police, no action was taken."

5. "Since our attendance at the last Council meeting and resulting local publicity, members of our association have been threatened with job action if they persisted in communicating with the media."

6. "There have been grievances filed through the Chief of Police up to the City

Administrator, and not on every particular item."

The City alleged that the statements constituted (1) insubordination; (2) dishonesty; and (3) failure to follow specific grievance procedures. (C.R. 1, Exhibit A, Excerpt at 11-13; C.R. 32, Exhibit A, Excerpt 63-65.) Petitioner appealed his termination to the city administrator who subsequently assigned the matter to a hearing officer. The hearing officer, a retired California Superior Court judge, held a 14-day judicial type administrative proceeding. (C.R. 32, Exhibit F, Excerpt at 193 et. seq, Excerpt at 262 et seq.)

On May 1, 1985, the hearing officer found that the City had not proved that petitioner violated the City Rules by speaking to the city council rather than following the formal grievance

procedures. However, he upheld the termination on the grounds of insubordination and dishonesty. The hearing officer determined that petitioner's statements were not protected by the first amendment. (C.R. 32, Exhibit F, Excerpt at 193 et. seq.) The hearing officer's decision was subsequently ratified by the city council. (C.R. 5, Excerpt at 15.)

Petitioner did not seek review of the hearing officer's decision in the California state courts. Cal. Code Civ. Pro. §§ 1094.5, 1094.6 (West, 1980). Instead, he sought review pursuant to 42 U.S.C. § 1983 (1982) in the United States District Court for the Eastern District of California by filing a timely complaint on November 14, 1985, contending, among other things, that the termination violates the first amendment

because it is based upon his speech to the city council. (C.R. 1, Excerpt at 1.)

Respondents moved for summary judgment based on this Court's opinion in University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed 2d 635, 106 S.Ct. 3220 (1986). (C.R. 32, Excerpt at 29) Respondents asserted that petitioner was barred from pursuing the section 1983 action because the California state courts would give collateral estoppel effect to the city hearing officer's prior unreviewed determination. People v. Sims, 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321 (1982). Petitioner contended that the question of whether, under the circumstances, his speech was protected by the first amendment is a question of law (Connick v. Myers, 461 U.S. 138, 148 n.7, 150 n. 10 (1983))

which is not the sort of "finding of fact" entitled to final preclusive effect under federal common law rules. Petitioner further argued that Elliott does not extend to findings of local municipalities, and that the issues decided by the hearing officer were not identical to the issues raised in the § 1983 action. Believing itself bound by the holding in Elliott, the district court granted summary judgment, which was entered on November 12, 1986.[4] Appendix at p. 52.

On November 20, 1986 petitioner filed a timely notice of appeal pursuant to 28 U.S.C. § 1291 (1982). On February 17, 1988 the court of appeals affirmed the judgment. Eilrich v. Remas, 839 F.2d

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[4] The district court's opinion is reproduced in the Appendix beginning at page 26.

630 (9th Cir. 1988). The court found that "The district court did not abuse its discretion in precluding relitigation of Eilrich's first amendment issue in the § 1983 action because the municipal administrative proceeding would have been given collateral estoppel effect under California law." 639 F.2d at 633, Appendix at 14-15. The court held that Elliott barred petitioner's § 1983 action, that Elliott applies to municipal agencies, and that Elliott applied to conclusions of law of state administrative agencies.

Petitioner did not seek rehearing in the court of appeals.[5]

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[5] Justice Kennedy served on the original panel that heard argument in the case. He was replaced by Judge O'Scannlain after he was appointed to this Court.

REASONS FOR GRANTING THE WRIT

I. The Extension of Common Law Rules of Issue Preclusion to Local Agency Determinations that Speech is Not Protected by the First Amendment Presents an Important Conflict with this Court's Many Decisions Holding that Whether Speech is Protected By the First Amendment is a Legal Question Subject to Independent Review.

This Court has repeatedly held that the question whether speech is constitutionally protected presents a question of law, not an ordinary finding of fact. See Rankin v. McPherson, 483 U.S. ___, 97 L.Ed.2d 315, 325, 107 S.Ct. 2891 (1987); Connick v. Myers, 461 U.S. 138, 150 n.10, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983); Pennekamp v. Florida, 328 U.S. 331, 335, 90 L.Ed. 1295, 66 S.Ct. 1029 (1946). In University of Tennessee v. Elliott, 478 U.S. 788, 92 L.Ed 2d 635, 106 S.Ct. 3220 (1986), the Court extended the common law doctrine of issue

preclusion to unreviewed findings of fact of state agencies. Whether the common law preclusion doctrine developed in Elliott prevents federal judges from deciding the question of law concerning the alleged violation of first amendment rights deserves the attention of this Court.

Mark Eilrich was fired for giving a speech to the City of Riverbank city council during the public business portion of a council meeting. No court has ever determined whether petitioner's termination was lawful; nor has a court decided whether petitioner's discharge violates the first amendment. Thus, this case does not involve application of the Full Faith and Credit statute to a judgment of a state court. 28 U.S.C. § 1738; Migra v. Warren City School District Bd. of Ed., 465 U.S. 75, 79

L.Ed.2d 56, 104 S.Ct. 892 (1984); Kremer v. Chemical Construction Corp., 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982). Instead, the case concerns the conflict between the objectives of the preclusion doctrine -- enforcing finality -- with the time honored first amendment doctrine, which traditionally has given courts, including this Court, the final responsibility to exercise "independent judgment" (Bose Corporation v. Consumers Union, 466 U.S. 485, 505, 80 L.Ed.2d 502, 104 S.Ct. 1949 (1984)) to decide that a legal determination "does not constitute a forbidden intrusion on the field of free expression." New York Times Co. v. Sullivan, 376 U.S. 254, 285, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964). The doctrine, which characterizes questions concerning application of substantive first amendment principles as questions of law,

has been applied in a wide variety of contexts. See Bose, 466 U.S. at 504-510, and cases cited. In recent years the doctrine has consistently been applied to public employee free speech cases. Rankin v. McPherson, supra; Connick v. Myers, supra.

Thus, this Court has characterized the inquiry in each particular situation whether speech is protected by the first amendment as a "question of law", Rankin, 97 L.Ed.2d at 325 n. 9; Connick, 461 U.S. at 147 n. 7, 150 n.10, or "constitutional fact" as in Bose, 466 U.S. at 508 n. 27. Throughout the opinions the principle emerges that initial determinations in first amendment cases simply do not bear the same deference and finality as other types of factual and constitutional determinations. Bose v. Consumers Union, supra. Hence the interests in finality

and repose -- which ordinarily support the doctrine of collateral estoppel -- are not as strong as they are in ordinary types of litigation.

Despite the extension of issue preclusion to § 1983 cases, this Court has indicated and held that judge made rules of issue preclusion will not apply when other competing values outweigh the principles furthered by rigid application of the collateral estoppel doctrine. "Other factors, of course, may require an exception to the normal rules of collateral estoppel in particular cases." Allen v. McCurry, 449 U.S. 90, 95 n. 7, 66 L.Ed.2d 308, 101 S.Ct. 411 (1980). Haring v. Prosise, 462 U.S. 306, 313 n. 7, 76 L.Ed.2d 595, 103 S.Ct. 2368 (1983); McDonald v. City of West Branch, 466 U.S. 284, 80 L.Ed.2d 302, 104 S.Ct. 1799 (1984). See, United States v. Mendoza,

464 U.S. 154, 78 L.Ed.2d 379, 104 S.Ct. 568 (1984).

In fact, this Court's opinion in Elliott holds, in part, that Congress intended a trial de novo in federal court on unreviewed Title VII claims (42 U.S.C. § 2000e-5(b)) which had previously been adjudicated by state administrative agencies. This exception to the usual preclusive effect given to unreviewed state agency determinations was based on the intention of Congress as expressed in the legislation.[6] 92 L.Ed.2d at 644-45.

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[6] In Elliott this Court found congressional intent sufficient to override the preclusion doctrine. Surely, the first amendment's procedural requirements provide at least as strong an interest to override the judge made rules of preclusion which otherwise give collateral estoppel effect to the conclusions of state administrative agencies.

In Patsy v. Board of Regents, 457 U.S. 496, 506, 73 L.Ed.2d 172, 102 S.Ct.

(continued...)

Freedom of speech is one of the most important rights we possess as Americans. As this Court recently reiterated "'[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures.'" Hustler Magazine v. Falwell, 485 U.S. ___, 99 L.Ed.2d 41, 49, 108 S.Ct. ___ (1988). The proper adjudication and protection of these rights is what makes the first amendment a living instrument of democracy. See, Bose v. Consumers Union, supra.

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[6](...continued)
2557 (1982) this Court recognized that Congress itself had expressed "mistrust", when it enacted the statute that became section 1983 "for the factfinding processes of state institutions." Although this mistrust might be insufficient to override issue preclusion in an ordinary § 1983 case, Elliott, supra, the mistrust coincides with the constitutional policy of independent review embodied in this court's first amendment jurisprudence.

Whether the adjudication of first amendment rights can be barred by the federal courts and relegated to local agencies whenever a claimant attempts to exhaust available remedies in a local forum and then seeks federal review affects the vitality of the first amendment as well as the proper and orderly administration of justice.

As the court of appeals for the second circuit once observed: "[C]onstitutional issues, ..., particularly in the First Amendment area, lie within the expertise of courts, not the expertise of administrators." Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974). Consistent with this observation, this Court carefully and repeatedly limited its holding in Elliott that issue preclusion applies in § 1983 cases to unreviewed decisions of administrative

agencies to "fact-finding of administrative bodies", "disputed issues of fact", and "administrative factfinding." 92 L.Ed.2d at 645-46 (emphasis added).[7] Thus the conflict with the court of appeals in this case should be resolved by confining Elliott to traditional "factfinding" determinations as opposed to the special constitutional doctrine involved in first

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[7] See, Gjellum v. City of Birmingham, 829 F.2d 1056, 1068 (11th Cir. 1987):

"Allen [v. McCurry, supra] itself left little room for a restrictive construction. The Court's opinion in Elliott, by contrast, is couched in terms of preclusion based upon administrative agency factfinding. Although the federal courts generally have yet to decide what type of "factfinding" the Elliott Court had in mind, the contrast between the Court's restrictive terminology in Elliott and the broad language in Allen suggests that Elliott was intended to establish a much narrower rule of preclusion."

amendment questions of law which bear a lesser degree of finality than ordinary factual determinations.

Whether the first amendment and the principles that this Court has consistently applied to assure its vitality provide an exception to the common law rules of issue preclusion applicable to state agencies merits review by the Court.

II. The Conflict Among the Courts of Appeals as to Whether Unreviewed Legal Conclusions of State Agencies Must be Given Collateral Estoppel Effect in Subsequent Actions Under 42 U.S.C. § 1983 Presents Important Unresolved Questions.

This Court's opinion in Elliott is carefully confined to the unreviewed factfinding of state administrative agencies. 92 L.Ed.2d at 645-46. The court of appeals in this case, however, stated that "The Court in Elliott does

not articulate a distinction between issues of fact and law in applying preclusion principles to administrative proceedings." 839 F.2d at 634 n.2; Appendix at 19. The Court of Appeals for the Ninth Circuit held that petitioner was barred from raising his first amendment claims in this § 1983 action despite the fact that respondents stipulated in district court that petitioner was fired from his job solely for reasons related to his speech to the council and city officials. Ibid. Thus, the court of appeals held that Elliott applies to both findings of fact of local agencies as well as questions of law.[8]

In Peery v. Brakke, 826 F.2d 740 (8th Cir. 1987), the Court of Appeals for the Eight Circuit clearly observed that

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[8] See also, Button v. Harden, 814 F.2d 382 (7th Cir. 1987)(dicta).

"Elliott directs that a state agency's factfinding is to be given preclusive effect in a subsequent § 1983 action." Id. at 746. Thus the court held that issue preclusion does not apply when the "disputed issue ... is one of law," ibid. (Emphasis added.) The Eighth Circuit unlike, the Ninth, refused to extend Elliott to legal questions interpreting the federal constitution decided by a state administrative agency.[9] [10]

Since 1980 this Court has resolved a series of questions concerning issue preclusion and claim preclusion doctrines

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[9] See also, Gjellum v. City of Birmingham, 829 F.2d 1056, 1068 (11th Cir. 1987) (dicta); Anderson v. Babb, 632 F.2d 300 (4th Cir. 1980).

[10] The legal issue in Peery involved application of this Court's decision in Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), concerning the right to procedural due process prior to termination from public employment.

as applied in the context of § 1983 cases. Allen v. McCurry, supra; Haring v. Prosise, supra; McDonald v. City of West Branch, supra; Migra v. Warren County Bd. of Ed., supra; and Elliott v. University of Tennessee, supra. Elliott extended the doctrine to a whole new class of cases -- unreviewed determinations of state agencies acting in a quasi-judicial capacity when the state courts would give collateral estoppel effect to the determination. It is extremely important for the lower federal courts as well as potential litigants to know whether Elliott extends to questions of law, or whether as the language of Elliott indicates, and the Eighth Circuit has held, the doctrine is limited to agency findings of fact.

Although local administrative bodies acting in a judicial capacity may be

equipped and competent to decide some traditionally factual issues, they are not inevitably and necessarily competent to decide purely legal issues interpreting the federal constitution.

Resolution of whether Elliott precludes federal district court's from considering legal questions previously raised in unreviewed state administrative proceedings is essential.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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May 16, 1988

(Appendix follows)

APPENDIX TO PETITION

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mark Eilrich,	)	
	)	
Plaintiff-Appellant,	)	No. 86-2940
	)	
v.	)	D.C.
	)	CV-F-85-635-REC
	)	
Bernard J. Remas, et al.	)	
	)	OPINION
Defendant-Appellees.	)	
	)	

Appeal from the United States District Court for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
October 7, 1987--San Francisco, California

Filed February 17, 1988

Before: Otto R. Skopil, Jr. and Dorothy W. Nelson, Circuit Judges, and Diarmuid O'Scannlain,* Circuit Judge

Opinion by Judge Nelson

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* Judge O'Scannlain was drawn to replace Judge Kennedy. He has read the briefs, reviewed the record and listened to the tape of oral argument held on Oct. 7, 1987.

* * * *

OPINION

NELSON, Circuit Judge:

Appellant Mark Eilrich, a municipal police officer was discharged by the City of Riverbank ("the City") after making statements about a controversy within the police department to the Riverbank City Council. A city administrative hearing officer, in upholding Eilrich's discharge, determined that the statements were not protected by the first amendment. The district court granted summary judgment for the City, finding that collateral estoppel barred Eilrich's claim for relief under 42 U.S.C. § 1983 (1982). The district court had jurisdiction pursuant to 28 U.S.C. § 1343 (1982). We have jurisdiction pursuant to 28 U.S.C. § 1291 (1982). We affirm.

BACKGROUND

The City discharged Eilrich on November 21, 1984 in response to statements he made as a representative of the Riverbank Police Officer's Association at a city council meeting. Eilrich was discharged for making the following statements, which were part of one speech delivered during the public business portion of the meeting:

> 1. "Chief Remas has recently commended in the local news media, in response to our publicly made unanimous 'no confidence' vote of his, ah, management practices, that it is his belief that the Riverbank Police Department is currently 'strong and viable' as an organization. It is our equally strong belief, as the actual members of the organization which he is describing, that his contention is simply false."
>
> 2. "Over the past several years it has been the policy of the Chief of Police to cause dismissal of traffic citations in the interest of justice."

3. "This practice is an unethical use of the Chief's power for his own personal or political purposes."

4. "There's been a misappropriation of public funds or time by favored members of the Police Department and although this was brought to the attention of the Chief of Police, no action was taken."

5. "Since our attendance at the last Council meeting and resulting local publicity, members of our association have been threatened with job action if they persisted in communicating with the media."

6. "There have been grievances filed through the Chief of Police up to the City Administrator, and not on every particular item."

The City discharged Eilrich, alleging that the statements constituted (1) insubordination; (2) dishonesty; and (3) failure to follow specific grievance procedures. Eilrich appealed his discharge pursuant to Cal. Gov't Code

§ 3304(b) (West 1980) and the City's Merit System Rules and Regulations ("the City Rules"). The hearing officer, a retired California Superior Court judge, held a 14-day proceeding. The hearing officer had adjudicatory power to resolve all the disputed issues submitted by the parties pursuant to Cal. Gov't Code §§ 11513 & 19570, et seq., (West 1980 & Supp. 1987) and the City Rules. On May 1, 1985, the hearing officer found that the City had not proved that Eilrich violated the City Rules by speaking to the city council rather than following the formal grievance procedures. However, the officer upheld Eilrich's discharge on the grounds of insubordination and dishonesty. He found that Eilrich made the statements at issue; that they constituted insubordination; and that they were

"false and were made wilfully, recklessly, and irresponsibly." The hearing officer determined that the statements were not protected by the first amendment because he found, after examining the factual circumstances surrounding the statements, that the City's interest in efficient functioning of the police force outweighed Eilrich's interest in expressing his views on a matter of public concern.

After the decision, the City Attorney immediately sent a letter notifying Eilrich that judicial review of this determination by a California superior court was available. However, the administrative decision became final when Eilrich failed to appeal within the statutory period. See Cal. Civ. Proc. Code §§ 1094.5, 1094.6 (West 1980). Eilrich subsequently filed a 42 U.S.C.

§ 1983 action in the district court on November 14, 1985, claiming that the appellees impermissibly discharged him for exercising his first amendment rights. On November 10, 1986, the district court granted the City's motion for summary judgment, finding that collateral estoppel barred consideration of the claim because the scope of protection afforded the statements by the first amendment had been determined in the prior proceeding. Eilrich timely appealed.

ISSUE PRESENTED

Whether collateral estoppel bars consideration of Eilrich's 42 U.S.C. § 1983 claim because the same issues were resolved in a prior unreviewed administrative determination.

STANDARD OF REVIEW

The availability of collateral

estoppel is a mixed question of law and fact which this court reviews de novo. Davis & Cox v. Summa Corp., 751 F.2d 1507, 1519 (9th Cir. 1985). If collateral estoppel is available, this court reviews the district court's decision giving preclusive effect to the determination of the municipal hearing officer for abuse of discretion. See Plaine v. McCabe, 797 F.2d 713, 718 (9th Cir. 1986).

DISCUSSION

I. THE AVAILABILITY OF COLLATERAL ESTOPPEL

Collateral estoppel, or "issue preclusion", requires that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a

subsequent action between the parties, whether on the same or a different claim." Restatement (Second) of Judgments § 27 (1982). Federal courts must give preclusive effect to state court reviewed administrative determinations under 28 U.S.C. § 1738, Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985), and to unreviewed administrative findings under federal common law rules of preclusion. University of Tennessee v. Elliott, 106 S.Ct. 3220, 3224 (1986). In Elliott, the Court held that state administrative proceedings must be given the same preclusive effect they would be given in that state when an administrative agency, "acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate

opportunity to litigate." 106 S.Ct. at 3227 (quoting United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422 (1966)).

Eilrich argues that the administrative decision was not preclusive because it was not reviewed by the California courts. Under California law, a discharged police officer is entitled to de novo judicial review of administrative agency determinations. See Cal. Civ. Proc. Code § 1094.5 (West 1980); Perea v. Fales, 39 Cal.App.3d 939, 114 Cal.Rptr. 808 (1974). Eilrich failed to seek review by the California courts even though he was advised of its availability. "If an adequate opportunity for review is available, a losing party cannot obstruct the preclusive use of the state administrative decision simply by

foregoing [the] right to appeal." Plaine, 797 F.2d at 719 n.12. In Plaine, we applied preclusion in similar circumstances when an appellant failed to seek judicial review by the California courts. Likewise, the discharged employee in Elliott failed to appeal an administrative determination through the state courts, 106 S.Ct. at 3223, and the Court applied collateral estoppel to bar his § 1983 claim even though the prior determination was unreviewed. Id. at 3225-26.

Eilrich relies on a Ninth Circuit case applying federal common law principles of collateral estoppel to argue that unreviewed administrative findings do not merit preclusive effect. Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279 (9th Cir. 1986). Such reliance is misplaced because the

court in Mack declined to give an unreviewed administrative hearing preclusive effect primarily because the plaintiff had had no opportunity to litigate his age discrimination claim, applying the Utah Construction standard. Id. at 1283. The nature of the unemployment compensation hearing had denied him the opportunity to litigate his claim and it was unclear if any evidence at all on the issue of age discrimination had been presented. Id. at 1283-84.

Eilrich also argues that this court should distinguish between according preclusive effect to state and municipal administrative determinations. Federal courts afford preclusive effect to state determinations because of comity and finality concerns. Elliott, 106 S.Ct. at 3226-27. The finality interests in

according preclusive effect to both types of determinations are identical. Although the comity interests in affording preclusive effect to municipal and state determinations are not identical, respecting a state court system for review of administrative decisions is furthered by applying collateral estoppel to Eilrich's claim. If collateral estoppel is not applicable to unreviewed municipal decisions, litigants will be encouraged to avoid state court review of municipal administrative determinations in order to obtain federal review of their claims. Looking to California preclusion law, as the Supreme Court instructed in Elliott, we find support for this conclusion. California courts accord collateral estoppel effect to municipal administrative hearings that have

sufficient judicial safeguards. See, e.g., City & County of San Francisco v. Ang, 97 Cal.App.3d 673, 679, 159 Cal.Rptr. 56, 59 (1979).

Thus, Eilrich's argument must fail if the administrative hearing meets the standards of California law, incorporating the Utah Construction standard.[1]

II. THE DISTRICT COURT'S APPLICATION OF CALIFORNIA LAW

The district court did not abuse its discretion in precluding relitigation of Eilrich's first amendment issue in the

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[1] The Ninth Circuit found in Mack that, as a matter of federal common law, preclusion did not apply because the administrative hearing failed to meet the Utah Construction threshold. 798 F.2d at 1283-84. The court thus found it unnecessary to reach California law. Id. at 1283 n.4. In Plaine, this court found that because California law incorporates the Utah Construction standard, no scrutiny beyond California law is necessary. 797 F.2d at 719 n.13.

§ 1983 action because the municipal administrative proceeding would have been given collateral estoppel effect under California law.

The California Supreme Court has established a two-part test to evaluate the preclusive effect to accord administrative agency determinations. People v. Sims, 32 Cal.3d 468, 186 Cal.Rptr. 77, 651 P.2d 321 (1982). The first part of the Sims test employs the standard the United States Supreme Court set out in Utah Construction: collateral estoppel should be applied "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." Utah Construction, 384 U.S. at 422, quoted in Sims, 32 Cal.3d at 479, 186 Cal.Rptr.

at 83, 651 P.2d at 327-28. The second part entails traditional collateral estoppel criteria, barring relitigation of an issue if:

> (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding].

Id. at 484, 186 Cal.Rptr. at 87, 651 P.2d at 331 (quoting People v. Taylor, 12 Cal.3d 686, 691, 117 Cal.Rptr. 70, 73, 527 P.2d 622, 625 (1974).

In Sims, the California Supreme Court found that a California Department of Social Services hearing had preclusive effect in a subsequent criminal prosecution for welfare fraud because it was "a judicial-like adversary

proceeding" conducted pursuant to Cal. Welf. & Inst. Code § 10950 (West 1980). 32 Cal.3d at 479, 186 Cal.Rptr. at 83, 651 P.2d at 328. Similarly, in the present case, Eilrich was afforded a 14-day proceeding resembling a trial, documented by an eleven-volume transcript. Under Cal. Gov't Code § 11513, both sides were entitled to call, examine and cross-examine witnesses under oath or affirmation. At the hearing, both parties were represented by counsel, twenty-one sworn witnesses testified, subpoenas were issued, and both parties presented oral argument and written memoranda. Both sides briefed the first amendment issue, the hearing officer considered these arguments and applied the appropriate legal standards to the facts surrounding Eilrich's statements and discharge. In addition, because the

hearing officer applied an established rule to specific existing facts rather than establishing a rule of law applicable to future cases, he acted in a judicial capacity. See Sims, 32 Cal.3d at 480, 186 Cal.Rptr. at 84, 651 P.2d at 328; Mack, 798 F.2d at 1283. Clearly, Eilrich had an adequate opportunity to litigate his first amendment claim with these procedures. See Plaine, 797 F.2d at 720 (upholding application of collateral estoppel to a similar California Corporations Commissioner's determination under the Sims test).

The facts of this case are clearly distinguishable from those in Mack, where we could not determine from the record whether any evidence on the plaintiff's age discrimination claim had even been presented. 798 F.2d at 1283-84. Thus, the determination satisfies the Utah

Construction standard because the hearing officer acted in a judicial capacity and the parties had adequate opportunity to litigate the first amendment issue. The traditional collateral estoppel criteria applied in the second part of the Sims test were also met because Eilrich was a party to the prior proceeding and the officer made a determination on the merits of the first amendment claim that became final when Eilrich failed to seek judicial review in the California courts.[2]

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[2] Eilrich argues that Utah Construction and Elliott apply preclusive effect only to administrative determinations of disputed facts. Because the parties stipulated that he was fired solely for the reasons contained in the Notice of Termination, he argues that no factual disputes are involved. The Court in Elliott does not articulate a distinction between issues of fact and law in applying preclusion principles to administrative proceedings. Further, collateral estoppel has been expanded in recent decades to preclude determinations

Eilrich also contends that the Sims test was not met because the issue determined in the administrative proceeding is not identical to that involved in his § 1983 claim. See Levi Strauss & Co. v. Blue Bell, Inc., 778 F.2d 1352, 1357 (9th Cir. 1985) (en banc); Amador v. Unemployment Ins. Appeals Bd., 35 Cal.3d 671, 684-85, 200 Cal.Rptr. 298, 306, 677 P.2d 224, 232 (1984). Eilrich attempts to avoid collateral estoppel by deleting several

---

of law as well as of fact. 4 K. Davis, Administrative Law § 21, 15 51 (2d ed. 1983). The first restatement of judgments distinguished between questions of law and questions of fact but the second restatement expressly applies collateral estoppel to both types of questions. See Restatement (First) of Judgments §§ 68, 70 (1942); Restatement (Second) of Judgments § 27 (1982). Similarly, California law does not distinguish between determinations of fact and law in evaluating administrative proceedings for preclusion purposes except in narrow circumstances which are not applicable here. See infra p. 12.

of the statements considered by the hearing officer from the § 1983 action and substituting one statement for a similar one considered in the administrative hearing. He argues that because the hearing officer considered a slightly different substantive set of statements, and because each statement was not separately analyzed, the district court could not rely on the hearing officer's finding that all the statements were not protected by the first amendment.

However, the six statements are all part of one speech and the legal standard required the hearing officer to applying a balancing test, looking at the circumstances surrounding Eilrich's speech and discharge. The hearing officer thoroughly examined each of the six statements separately, listing the

reasons he found them unprotected by the first amendment. The hearing officer conducted the same balancing test which would be applied to Eilrich's claims in a § 1983 action and found the City's interests in maintaining efficient public service by minimizing disruption and preventing the undermining of the police chief's authority outweighed Eilrich's interest in expression on matters of public concern. See, e.g., Connick v. Myers, 461 U.S. 138 (1983); Franklin v. Leland Stanford Jr. Univ., 172 Cal.App.3d 322, 218 Cal.Rptr. 228 (1985). Thus, the hearing officer and the district court had the same expressive conduct before them and the hearing officer actually and necessarily decided the identical issue. See Sims, 32 Cal.3d at 485, 186 Cal.Rptr. at 87, 651 P.2d at 332.

Eilrich's argument must fail because

it would allow a party to evade collateral estoppel in a subsequent action by merely changing the statements to be considered, although they arise from the same factual circumstances and the legal standard requires an overall examination of those circumstances. Condoning such strategic evasion would thwart the policies underlying collateral estoppel: "(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation." Taylor, 12 Cal.3d at 695, 117 Cal.Rptr. at 76, 527 P.2d at 628.

California courts have created an exception to collateral estoppel to allow relitigation of a question of law when

injustice would otherwise result. See, e.g., Rutherford v. State, 188 Cal.App.3d 1267, 1285, 233 Cal.Rptr. 781, 790-91 (1987) (unclear if issue was actually resolved where appellate department reversed without an opinion); Restatement (Second) of Judgments § 28 (1982). However, this court has upheld a California court's refusal to apply this exception in circumstances similar to those of Eilrich. Clark v. Yosemite Community College Dist., 785 F.2d 781, 788 (9th Cir. 1986). In Clark, claim preclusion applied to bar federal court litigation of a discharged professor's § 1983 claim after a state court judgment. This court did not find manifest injustice in the situation or a legal issue of public importance to justify relitigation in the primarily factual determination upholding the

professor's discharge for expressive conduct. See also Carmel Valley Fire Protection Dist. v. State, 190 Cal.App.3d 521, 234 Cal.Rptr. 795, 803 (1987); Ang, 97 Cal.App.3d at 679, 159 Cal.Rptr. at 59.

Allowing relitigation of Eilrich's claims would encourage litigants to forego state court review to receive federal review in § 1983 actions. This result would contravene the dictate of Elliott, where five Justices determined that § 1983 claims did not necessarily mandate a federal forum.

We affirm because the district court did not abuse its discretion in finding that the administrative hearing would be accorded preclusive effect in California courts.

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MARK EILRICH, Plaintiff,	)	NO. CV-F-85-635 REC
v.	)	DECISION AND ORDERS RE CROSS MOTIONS FOR SUMMARY JUDGMENT
BERNARD J. REMAS, et al., Defendants.	)	

On October 20, 1986, the court heard the parties respective cross-motions for summary judgment. Upon due consideration of the written and oral arguments of the parties and the record herein, the court enters its order denying plaintiff's motion and granting defendant's motion for the reasons set forth herein.

These cross-motions for summary judgment involve the application of issue preclusion or collateral estoppel to this action resulting from an administrative hearing for the disciplinary appeal filed

by plaintiff following his termination as a police officer by the City of Riverbank on grounds of insubordination, dishonesty and violation of the City Merit System Rules and Regulations. Defendants seek preclusion and plaintiff opposes.

1. Timeliness and Waiver.

As a threshold, plaintiff argues that defendants' assertion of the affirmative defense of collateral estoppel is not timely and that they should be deemed to have waived that affirmative defense. See Harbeson v. Parke Davis, Inc., 746 F.2d 517, 529 (9th Cir. 1984). The Status Conference Order filed March 10, 1986 gave defendants leave to file an amended answer raising a collateral estoppel defense based on plaintiff's administrative appeal hearing following termination, giving defendants "thirty days from the date of this order to file said amendment." The

amended answer was filed on April 11, 1986 at 10:22 a.m., having been mailed on April 10, 1986.

While the court does not agree with defendants' contention that service of the amended answer was in fact in accordance with the court's order or that plaintiff has waived any objection by his failure to either seek entry of default or to file a motion to strike pursuant to Rule 12(f), Federal Rules of Civil Procedure, the court nonetheless is of the opinion that the untimeliness verges on a technicality and that the late filing in no way prejudiced the plaintiff. Accordingly, the court holds that defendants have not waived the affirmative defense of collateral estoppel.

2. Application of Collateral Estoppel to Administrative Hearing.

Citing United States v. Utah

Construction and Mining Company, 384 U.S. 394 (1966), University of Tennessee v. Elliott, ___ U.S. ___, 92 L.Ed.2d 635 (1986) and People v. Sims, 32 Cal.3d 468 (1982), defendants argue that the principles of claim and issue preclusion can apply to the decision of the Administrative Law Judge in the Merit System Appeal.

Plaintiff responds that application of collateral estoppel to unreviewed decisions of municipal administrative bodies is not required or permitted by the above-cited cases because they only apply to administrative decisions of federal or state agencies established under state or federal law. None of these cases, however, specifically addresses the issue raised by plaintiff.

In arguing that preclusion does not apply to decisions of municipal

administrative agencies, plaintiff, citing Amador v. Unemployment Insurance Appeals Board, 35 Cal.3d 671, 685 n.12 (1984), states that "[t]he California Supreme Court has expressly refused to decide whether collateral estoppel effect must be given to the findings of local personnel boards." Amador, id. states:

> Since the issues are not identical, it is not necessary to determine whether, as a general matter, a finding of a county civil service commission regarding a short suspension binds the ALJ and the board in a subsequent proceeding to determine eligibility for unemployment benefits.

In the court's opinion, however, this footnote from Amador means nothing with regard to the resolution of the issue before the court and certainly does not constitute an indication as to the position on the merits of this issue by the California Supreme Court.

Plaintiff further argues that "[t]he decision in People v. Sims, 32 Cal.3d 468 (1982) which gives collateral estoppel effect to a state Department of Social Services hearing concerning eligibility for welfare benefits is expressly confined to that situation. To our knowledge the case has not been extended to decisions of local agencies."

Again, the court does not read anything in the pertinent portion of Sims, id. at 476-483, which specifically limits that case to decisions of state administrative agencies. In fact, Sims at 478 cites City and County of San Francisco v. Ang, 97 C.A.3d 673 (1979) without disapproval. In Ang, the Court of Appeal gave preclusive effect in a collateral civil proceeding of a zoning issue previously decided by a city board of permit appeals. Moreover, Sims, id. at

479-480 n.8 stated:

> The fact that statewide and local administrative agencies are prohibited from exercising 'judicial power' by the California Constitution does not mean that agency proceedings and determinations may never be judicial in nature. (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28 [112 Cal.Rptr. 805, 520 P.2d 29]; Standard Oil Co. v. State Board of Equal. (1936) 6 Cal.2d 557 [59 P.2d 119].) This distinction was not recognized by Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal.2d 33 [168 P.2d 686], upon which the people rely for the proposition that collateral estoppel is not applicable to administrative agency decision. In Empire Star Mines the court found a decision of the California Employment Commission not to be binding in a subsequent court proceeding because the commission did not exercise 'judicial power' under the Constitution. (Id., at p. 48.) The court did not determine whether the commission's proceedings were judicial in nature. The analysis of Empire Star Mines is inconsistent with that conducted in Hollywood Circle, Utah Construction, and the instant case. So that the law if free

> from ambiguity in this area, Empire Star Mines is overruled to the extent that it conflicts with this opinion.

Plaintiff further argues that Taylor v. New York City Transit Authority, 433 F.2d 665 (2d Cir. 1970), cited by defendants and which gives preclusive effect to a city administrative finding, is an aberration:

> [T]he case appears not to have gained a large following in the many years since it was decided and the case predates modern collateral estoppel analysis in connection with § 1983 actions. Significantly, New york Court would have given collateral estoppel effect to Municipal and State Civil Service Commissions at the time that the Second Circuit decided Taylor v. New York City Transit Authority. See Taylor v. New York City Transit Authority, 309 F.Supp. 785, 791 (E.D.N.Y. 1970).

This argument is not persuasive to the extent it is comprehensible and plaintiff otherwise cites no authority supportive of his proposition that collateral estoppel

effect can only be given to administrative decisions of state agencies.

The court agrees in any event with defendants that the focus of inquiry in deciding whether or not preclusive effect should be given to an administrative decision is upon the procedure employed during the administrative process. Thus, in United States v. Utah Construction & Mining Company, supra at 421-422:

> Occasionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Accord People v. Sims, supra at 479. Consequently, the court concludes that claim preclusion may apply to the

administrative decision at issue here.

3. De Novo Review.

Plaintiff recognizes that the Supreme Court in University of Tennessee v. Elliott, supra at 645-647, held in a Section 1983 action that when a state agency's procedures comport with Utah Construction and Mining Company, supra, the federal courts must give the agency's factfinding the same preclusive effect to which it would be entitled in the state's courts. Citing, however, that portion of the Supreme Court's decision holding that from the language and legislative history of Title VII Congress did not intend unreviewed state administrative proceedings to have preclusive effect on Title VII Claims, id. at 644-645, plaintiff argues that a similar result must apply to plaintiff's First Amendment claims. Citing Holley v. Seminole County

School District, 755 F.2d 1492, rehearing denied, 763 F.2d 399 (11th Cir. 1985), plaintiff contends:

> It is inconceivable that the federal courts are bound to give preclusive effect to the findings of municipal hearing officers in first amendment cases. If appellate courts give de novo review to findings of lower federal courts, as well as state courts, concerning whether speech is protected or unprotected, then surely federal courts are not to be barred from giving the same type of de novo review to unreviewed municipal agency decisions.

In Holley, 755 F.2d at 1500-1504, the Eleventh Circuit held:

> [A] discharged or nonrenewed teacher asserting a claim of First Amendment right under Mt. Healthy is entitled to a de novo hearing in federal court regardless of whether that teacher resorted to an administrative hearing or whether such hearing purported to decide the constitutional issue. The policy enunciated by § 1983 in vesting original jurisdiction for constitutional claims in the district court requires no less.

Id. at 1504.[3] However, although not pointed out by plaintiff, Holley, 763 F.2d at 400-401 held:

> The petition for Panel Rehearing is DENIED. Appellees argue on rehearing that because appellant's constitutional claims were rejected by the Georgia State Board of Education, the federal full faith and credit statute, 28 U.S.C.A. § 1738, precludes litigation of those claims in federal court under the Supreme Court's analysis in Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). We note that § 1738 applies only to the preclusive effect of 'judicial proceedings' of state courts, , , , and, thus, would be inapplicable to proceedings in front of the Georgia State Board of Education. Nevertheless, the preclusive effect, in a 42 U.S.C.A. § 1983 case, of state administrative proceedings, by analogy to § 1738, is a difficult and

---

[3] It should be noted that footnote 8 of plaintiff's brief concedes that Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) does not apply to this action.

> arguably open question in this circuit which may be subject to differing analyses depending on the character of the administrative proceeding and the type of claim being raised in the federal action.
>
> . . . However, since appellees did not brief or argue the applicability of § 1738 or any related doctrine of administrative preclusion in their briefs to this panel we will not entertain these thorny questions presented for the first time in appellees' petition for rehearing.

See also Sharpley v. Davis, 786 F.2d 1109, 1111-1112 (11th Cir. 1986). Moreover, res judicata has been applied pursuant to section 1738 in Section 1983 actions involving claims of termination in violation of First Amendment rights. Gahr v. Trammel, 796 F.2d 1063, 1068-1070 (8th Cir. 1986); Holmes v. Jones, 738 F.2d 711 (5th Cir. 1984); but see Stall v. Bourne, 774 F.2d 657 (4th Cir. 1985), opinion withdrawn, 783 F.2d 476 (4th Cir. 1985).

University of Tennessee v. Elliott was not based upon the application of Section 1738. The Supreme Court, however, referred to Allen v. McCurry and Migra v. Warren City School District Board of Education, which applied issue preclusion and claim preclusion, respectively, to Section 1983 actions pursuant to Section 1738, in concluding that collateral estoppel could apply to administrative decisions in Section 1983 actions, under the circumstances set forth herein infra. There is no indication in Elliott that its conclusion would not apply to a First Amendment claim. And see McCulty v. Rockefeller, 570 F.Supp. 1455, 1458-1461 (S.D.W.Va. 1983); see also Clark v. Yosemite Community College District, 785 F.2d 781, 788, 788 n.9 (9th Cir. 1986).

Consequently, the court concludes that plaintiff is not entitled to de novo

review of his First Amendment claim.

4. Application of Collateral Estoppel.

In Utah Construction & Mining Company, supra at 422, the United States Supreme Court held:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

Here it is undisputed that a timely appeal to the Notice of Termination was filed by the plaintiff with the City of Riverbank. The notice was filed pursuant to California Government Code § 3304 and the Riverbank Merit System Rules and Regulations. The City Manager is designated by the City Merit Systems Rules and Regulations as the hearing officer for all disciplinary appeal hearings.

However, the plaintiff filed a written objection to the existing City Manager as the administrative hearing officer and, consequently, the Honorable Jean Morony, Superior Court Judge, Retired, was appointed as the administrative hearing officer for the disciplinary appeal filed by the plaintiff. Judge Morony was, by agreement, vested with full power and authority under the City Merit System Rules and Regulations and the California Government Code to resolve all disputed issues submitted by the parties. The administrative hearing on the Merit System Appeal commenced on March 12, 1985. The proceeding consumed fourteen hearing days. It was concluded and submitted to the hearing officer on April 16, 1985. During that period of time, twelve witnesses were sworn and called to testify by plaintiff, eleven witnesses were sworn and called

[to] testify by defendants, plaintiff introduced 29 exhibits, defendants submitted 51 exhibits, plaintiff and the City of Riverbank were at all times represented by counsel, the entire hearing was reported by a Certified Shorthand Reporter, and the administrative hearing was conducted pursuant to California Government Code §§ 11513 and 19580. Furthermore, civil discovery was requested by both sides during the hearing and was allowed by order from the administrative hearing officer and the right to confrontation and cross-examination of all witnesses was recognized throughout the hearing. Plaintiff was entitled to judicial review of Judge Morony's decision pursuant to California Code of Civil Procedure § 1094.5 although the time for review having expired, Judge Morony's decision is now final under Code of Civil

Procedure § 1094.6.

Plaintiff's only contention that the procedures set forth above do not comport with Utah Construction & Mining Company factors is his argument that the proceedings did not accord him due process of law because:

> In this case plaintiff received notice and the opportunity to be heard, but he received notice of one set of issues while the hearing officer proceeded to make a decision based upon another set of issues. . . . Since the hearing officer went beyond the scope of the issues presented in the notice of termination and held that additional facts justified the termination, plaintiff was not given a fair opportunity to litigate the first amendment questions presented by the notice of termination.
>
> Defendants have presented no evidence in their papers accompanying their motion for summary judgment indicating that the issues on the administrative appeal were expanded beyond the scope of the notice of termination. Indeed they concede that the notice of

> termination defined the issues. Therefore, the city hearing did not meet the fairness standards necessary to give the decision preclusive effect.

To the extent this argument is directed to the full and fair opportunity to litigate, plaintiff was represented by counsel throughout the Merit System Appeal. And, according to the undisputed averments in the Supplemental Declaration of Michael D. Milich in Support of Motion for Summary Judgment:

> 4. . . . [T]he plaintiff unilaterally raised the very issues that he now contends were extraneous to the decision by Judge Morony. . . .
>
> 5. Each of the statements discussed specifically by plaintiff in its opposition were raised by plaintiff in the context of its First Amendment arguments. . . . This evidence was met by the defendants with documentary and testimonial evidence. The issues were properly raised and fully developed by both sides during the hearing and were submitted to the hearing officer for a

> full, fair and final decision. Moreover, plaintiff at no time during the administrative hearing objected to the introduction of evidence pertaining to the above statement.[4]

Under these circumstances, the court concludes that plaintiff's argument that the Utah Construction & Mining Company factors were not satisfied herein is without merit. See, e.g., Baroid Division

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[4] At oral argument, plaintiff objected to the court's consideration of defendants' reply brief and Milich's supplemental declaration on the ground that they were not timely filed in accordance with Rule 230(d), Local Rules of Practice, they again being filed one day late. Plaintiff, however, pointed to no prejudice resulting to him from the late filing and the court itself was not inconvenienced in this instance. Given the importance of these cross-motions for summary judgment to the ultimate disposition of this action, the court will consider these pleadings. Defendants' counsel is cautioned, however, that compliance with the court's local rules is necessary not only to avoid potential prejudice to the opposing party and potential delays in ruling upon a matter but also in order that the court may be timely prepared to hear oral argument.

of NL Industries, Inc. v. Occupational Safety and Health Review Commission, 660 F.2d 439, 449 (10th Cir. 1981) ("'So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency even though the formal pleadings did not squarely raise the issue.'").

Plaintiff further argues that collateral estoppel cannot be applied because the issues adjudicated by Judge Morony in the Merit System Appeal are not identical to the issues raised in the action before the court.

Plaintiff cites People v. Sims, supra at 484 and Amador v. Unemployment Insurance Appeals Board, supra at 684 for the proposition that "[c]ollateral estoppel bars relitigation of an issue decided at a previous hearing only if the issue necessarily decided at the previous

proceeding is identical to the one which is sought to be relitigated." In Amador, the requisite identity of issues was not found because "[t]he issue of 'insubordination' under the county rules differs substantially from the issue of 'misconduct' under the code." Id. Conversely, Sims held that the fraud issue litigated at the DDS was identical to that involved in the criminal proceedings. Id. at 484-485. In the Merit System Appeal, plaintiff asserted in his Pre-Hearing Brief that his termination violated his First Amendment right to free speech. This issue was actually litigated in the Merit System Appeal. The complaint in this action alleges that plaintiff's termination violated his federal and state constitutional rights to free speech and freedom of assembly. Thus, at least to the extent that plaintiff's constitutional

claims are based on free speech, the issue is identical.[5] As generally noted supra, plaintiff's argument that the issues are not identical is predicated on his assertion that Judge Morony considered certain statements made by plaintiff which were not specifically listed in the Notice of termination in determining that plaintiff's termination did not violate his First Amendment rights to free speech. Because the Status Conference Order in the action before this court states that "[t]he parties agree that plaintiff was terminated solely for the reasons set forth in [the Notice of Termination] attached to the complaint[,]" plaintiff contends that the issues are not identical. At oral argument, plaintiff stated that he had agreed at the status

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[5] Neither of the parties discusses the freedom of assembly issue.

conference to a dismissal without prejudice of his claims that his termination without a pre-termination hearing violated due process within the meaning of the Fourteenth Amendment to the United States Constitution and Sections 7(a) and 15 of the California Constitution in exchange for the stipulation in the Status Conference Order set forth above. Plaintiff referring the court to Connick v. Myers, 461 U.S. 138 (1983), argues that "[a] proper focus on each of the offending statements is essential because each statement must be examined to determine whether it concerned a matter of public concern and whether it was protected under the First Amendment." This is, however, what Judge Morony did in the Merit System Appeal. The court does not see that collateral estoppel would be any less applicable because, by stipulation of the

parties, the statement to which collateral estoppel is sought in this action are less in number than those in fact considered by Judge Morony. Plaintiff cites no authority supportive of this position and the court's research has found none. There is no suggestion that the First Amendment claims with regard to the statements listed in the Notice of Termination were not decided by Judge Morony.[6]

---

[6] Plaintiff also argues that California courts would not necessarily give preclusive effect here to the extent pure questions of law are involved and nonapplication is necessary to prevent manifest injustice. The court, however, is not persuaded that the circumstances here preclude application of collateral estoppel. The fact that plaintiff's claims are grounded in the First Amendment does not in and of itself constitute manifest injustice. See Clark v. Yosemite Community College District, 785 F.2d 781, 788 (9th Cir. 1986).

ACCORDINGLY, IT IS ORDERED that plaintiff's Motion for Summary Judgment is denied and that defendants' Motion for Summary Judgment is granted.

DATED: November 10, 1986.

/s/ Robert E. Coyle

ROBERT E. COYLE

United States District Judge

[FILED NOV 10 3:35 PM '86]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARK EILRICH,

Plaintiff

V.

BERNARD J. REMAS,
et al,

Defendants

JUDGMENT IN A CIVIL CASE

CASE
NUMBER: CV F 85-635 REC

/ / Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

/X/ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

ACCORDINGLY, IT IS ORDERED that plaintiff's Motion for Summary judgment is Denied and that defendant's Motion for Summary Judgment is Granted.

November 12, 1986
Date

J.R. Grindstaff
Clerk

/s/ P. Mosqueda
(By) Deputy Clerk
P. MOSQUEDA

[FILED NOV 12 10:29 AM '86]

(2)

Supreme Court, U.S.
FILED
JUL 6 1988
CLERK

No. 87-1895

In the Supreme Court of the United States

October Term, 1987

MARK EILRICH,

Petitioner,

v.

BERNARD J. REMAS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM IN OPPOSITION BY RESPONDENTS

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QUESTION PRESENTED

Whether collateral estoppel principles bar relitigation of petitioner's first amendment claim under 42 U.S.C. § 1983 because the same issues were adjudicated in a prior, administrative hearing which otherwise satisfied preclusion safeguards.

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42 U.S.C. § 1983 (1982) ..... *passim*

Constitution

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Miscellaneous

Restatement (First) of Judgments § 68 (1942) 7

Restatement (Second) of Judgments § 27 (1982) 7

4 K. Davis, *Administrative Law* § 21.2 p.51 (2d ed. 1983) 7

OPINIONS BELOW

Respondents agree with the recitation by petitioner. Respondents add, however, the decision by the administrative hearing officer, Honorable Jean Morony, judge retired. The decision is included as appendix A to this brief, referred to as "Resp. App.".

STATUTES INVOLVED

Respondents agree with petitioner's recitation.

STATEMENT OF THE CASE

Mark Eilrich was terminated as a municipal police officer by the City of Riverbank on November 21, 1984. (C.R. 32; Excerpt at 63).[1] Petitioner was terminated after making statements to the city council about a controversy within the police department. The grounds for termination were insubordination, dishonesty, and violations of the city merit system rules and regulations. (C.R. 32, Exhibits A and B; Excerpt at 63, 67).

Petitioner filed a timely Notice of Appeal of Disciplinary Action with the City of Riverbank. The Honorable Jean Morony, Superior Court Judge, retired, was appointed as administrative hearing officer for the disciplinary appeal filed by Eilrich.

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[1] References to the record correspond with petitioners use of "C.R." as the designation for clerks record and "Excerpt" to reflect the excerpt of record filed with the Court of Appeals.

Eilrich was afforded a fourteen day hearing which resembled a trial. The parties were represented by counsel, twenty-one witnesses were sworn and testified, subpoenas were issued, oral and written argument was presented by the parties, and the hearing was documented by an eleven volume transcript. (Pet. 17).

On May 1, 1985, a written decision was issued by the hearing officer. (Resp. App.). The hearing officer determined that the statements by Eilrich at the city council meeting on November 13, 1984, were false and were made willfully, recklessly, and irresponsibly. (Resp. App. 8). After examining the totality of factual circumstances surrounding the statements, the hearing officer also found that the statements were not protected by the first amendment because the city's interest in efficient functioning of the police department outweighed Eilrich's interest in expressing his views on a matter of public concern. (C.R. 32, Exhibit F; Excerpt at 192-219; Resp. App. 8-10).

The administrative decision by Judge Morony became final when Eilrich failed to appeal within the statutory period, despite notice of the right to appeal. (Pet. App. 6). On November 14, 1985, petitioner filed an action in the district court pursuant to 42 U.S.C. § 1983 alleging unlawful discharge for the exercise of first amendment rights.

On November 10, 1986, the district court granted the motion for summary judgment by respondents. On February 17, 1988, the Court of Appeals affirmed the judgment. (Pet. App. 1-25). *Eilrich v. Remas*, 839 F.2d

630 (9th Cir. 1988). The Ninth Circuit held that, "(t)he district court did not abuse its discretion in precluding relitigation of Eilrich's first amendment issue in the § 1983 action because the municipal administrative proceeding would have been given collateral estoppel effect under California law." (Pet. App. 14-15). *Eilrich v. Remas,* 839 F.2d at 633.

SUMMARY OF ARGUMENT

Petitioner challenges application of the doctrine of preclusion to first amendment claims under § 1983. Respondents respectfully submit that this petition should be denied for several reasons. First, the court below fully considered and properly decided the cause. Second, there is no decisional conflict for resolution by this Court. Finally, the contentions by petitioner are unsupported and are without merit.

REASONS FOR DENYING THE WRIT

I

REVIEW BY THIS COURT IS NOT WARRANTED BECAUSE THE OPINION BELOW IS CORRECT AND IS CONSISTENT WITH DECISIONS BY THIS AND OTHER FEDERAL COURTS.

This case does not present a conflict for resolution by this Court. The "conflict" has been manufactured by petitioner to create tension between the preclusion doctrine and the first amendment. (Pet. 17 n.6). In reality,

a discernible compatibility exists between § 1983, to include the first amendment, and the rules of preclusion. *Allen v. McCurry*, 449 U.S. 90 (1980). This Court noted in *Allen* at page 97 that:

> . . . the virtually unanimous view of the Courts of Appeals since *Preiser* has been that § 1983 presents no categorical bar to the application of res judicata and collateral estoppel concepts. These federal appellate court decisions have spoken with little explanation or citation in assuming the compatibility of § 1983 and rules of preclusion, but the statute and its legislative history clearly support the courts' decisions.

The objectives of the preclusion doctrine are well documented and widely recognized. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980). The doctrine is unquestionably fully applicable to civil rights actions brought under § 1983. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986).

There is no authority for or any reasonable basis to mandate a federal forum for first amendment claims brought under § 1983. In fact, a similar argument was rejected by this Court in *Allen v. McCurry* at page 105:

> The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that *Stone v. Powell* provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so. (Citations).

The federal courts have consistently accorded preclusive effect to first amendment claims brought under § 1983 when properly determined by administrative process. *Holmes v. Jones*, 738 F.2d 711 (5th Cir. 1984); *Gahr v. Trammel*, 796 F.2d 1063 (8th Cir. 1986). See also, *Clark v. Yosemite College District*, 785 F.2d 781 (9th Cir. 1986). On the other hand, there are no federal cases which reject or question application of preclusion principles to first amendment claims under § 1983.

Petitioner relies on dicta in *Allen v. McCurry*, 449 U.S. 90, 95 n.7 (1980) to suggest that the first amendment, "may require an exception to the normal rules of collateral estoppel in particular cases." (Pet. 16). In fact, this Court specifically declined to discuss or address exceptions, if any, to the collateral estoppel doctrine in *Allen v. McCurry*, 449 U.S. at 95 n.7:

> It must be emphasized that the question whether any exception or qualification within the bounds of that doctrine might ultimately defeat a collateral estoppel defense in this case is not before us.

Thus, *Allen* does not provide support for the contention by petitioner that first amendment claims should be treated as an exception to the normal rules of collateral estoppel. In addition, while certain, narrow exceptions to the doctrine of collateral estoppel exist, the balance of authorities cited in the petition do not support, or even hint, that a categorical exception should be created for claims under the first amendment. See *United States v. Mendoza*, 464 U.S. 154, 161 n.7 (1984); *Haring v. Prosise*, 462 U.S. 306, 313 n.7 (1983); *cf. McDonald v. City of West Branch*, 466 U.S. 284, 291-92 (1984) (collective bargaining exception).

The lower court below correctly determined that the administrative hearing met the standards of California law for the application of preclusion under *University of Tennessee v. Elliott,* 478 U.S. 788 (1986). There is no tension and, indeed, no conflict between the doctrine of preclusion and the first amendment.

II

THERE IS NO MERIT TO PETITIONER'S CONTENTION THAT FIRST AMENDMENT CLAIMS ARE EXEMPT FROM THE DOCTRINE OF PRECLUSION BECAUSE THEY ARE LEGAL QUESTIONS ENTITLED TO INDEPENDENT FEDERAL REVIEW.

Reliance by petitioner on the distinction between fact and law is misplaced. There is no substantive distinction between fact and law in the context of collateral estoppel or preclusion. Thus, the hearing officer applied established law to the facts as determined during the hearing.

In *Eilrich v. Remas,* 839 F.2d at 634, n.2 (Pet. App. 19), the court below addressed the contentions by petitioner as follows:

> . . . The Court in *Elliott* does not articulate a distinction between issues of fact and law in applying preclusion principles to administrative proceedings. Further, collateral estoppel has been expanded in recent decades to preclude determinations of law as well as of fact. 4 K. Davis, *Administrative Law* § 21, at 51 (2d ed. 1983). The first restatement of judgments distinguished between questions of law and questions of fact but the second restatement expressly applies collateral estoppel to both types of questions. (Citations). Similarly, California law does not distinguish between determinations of fact and law in evaluating

> administrative proceedings for preclusion purposes except in narrow circumstances which are not applicable here. (Citations).

In *University of Tennessee v. Elliott,* 478 U.S. 788 (1986), this Court emphasized and focused upon the nature of the administrative proceeding and the value of enforcing repose in determining whether the doctrine of collateral estoppel or preclusion should operate to bar a federal claim. As noted by the Ninth Circuit, this Court did not draw a distinction between issues of law or fact in *Elliott.*

Furthermore, California law does not distinguish between determinations of fact and law in evaluating administrative proceedings for preclusion purposes. *People v. Taylor,* 12 Cal. 3d 686, 691 (1974); *People v. Sims,* 32 Cal. 3d 468 (1982).

Finally, the Restatement (Second) of Judgments eliminated any reference to fact/law distinction. The difference between the first and second Restatement is noted by Professor Davis in his treatise on administrative law at 4 K. Davis, *Administrative Law* § 21.2 p.51 (2d ed. 1983):

> The general law of res judicata, only a part of which involves administrative law, has undergone two major changes since 1960—expansion to emphasize determinations of law as well as determinations of fact, and expansion to provide benefits of collateral estoppel or issue preclusion to nonparties as well as to parties and to those in privity with parties. Both changes are rather fundamental. The first Restatement of Judgments (1942) limits collateral estoppel to "a question of fact" in § 68 (1); but the second Restatement (1982) provides in § 27 (subject to exceptions in § 28) that a determination of an issue of fact "or

> law'' may be conclusive in subsequent actions between the parties. . .

The distinction, if any, between issues of fact or law for purposes of preclusion is a distinction without a difference. Issues of fact and law have been reconciled by the Restatement of Judgments to operate with equal force within the doctrine of preclusion. Decisional authority has focused upon the nature of the proceeding rather than the category of adjudication. Accordingly, even if the issues are purely legal, as urged by petitioners, there is no basis or authority to treat issues of fact or issues of law differently so long as the legal standards associated with preclusion are satisfied.

———o———

CONCLUSION

The doctrine of preclusion operates to bar civil rights actions, including first amendment claims, brought under § 1983 where sufficient judicial safeguards exist and the traditional collateral estoppel criteria are satisfied. Review by this Court is not warranted because the court below properly applied these existing principles of law and because there is no conflict which requires resolution.

Respectfully submitted,

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April 29, 1985

Mr. Gene Robirds
City Administrator
City of Riverbank
6707 Third Street
Riverbank, CA 95367

Re: Disciplinary Appeal of Mark Eilrich

Dear Mr. Robirds:

There is being personally handed herewith to your office the Decision on Appeal in the above matter.

Copies of the same are being mailed to the attorneys on the same day that this is delivered to you.

Very truly yours,

/s/ Jean Morony

JM:pm
Enc.
cc w/enc:

Mr. Michael D. Milich
Mr. T. W. Salter
Mr. Ralph J. Nase

In the Matter of	)	
	)	
MARK EILRICH, Appellant,	)	
	)	
and	)	DECISION
	)	OF APPEAL
CITY OF RIVERBANK,	)	
Respondent.	)	

THE APPEAL

On November 21, 1984 Officer Mark Eilrich was terminated as a Police Officer with the Riverbank Police Department on the following grounds:

1. *Insubordination:* Section 1002(c) of the City of Riverbank Merit System Rules and Regulations.

2. *Dishonesty:* Section 1002(d) of the City of Riverbank Merit Rules and Regulations.

3. *Violation of Section 50 of Chapter 6 of Volume 1 of the City of Riverbank Police Department Manual:* Chain of command (a cause for discipline pursuant to Section 1002 (o) of the City of Riverbank Merit System Rules and Regulations).

Under date of November 26, 1984 an appeal was filed per Government Code sections 3300 et seq. The matter came on regularly for hearing on March 12, 1985 and, upon the conclusion of arguments, the matter was taken under submission on April 16, 1985.

THE FACTS

Evidence both oral and documentary was received and, based thereon, the following is found to be true:

There are attached the following eight (8) Addenda, namely: Chronology of Events, Criminal Investigations—Ethics, Traffic Citations, Misappropriation of Public Funds or Time, Job Threats, Criminal Activity, Grievances, and Strong and Viable Organization. The salient facts as found are set forth in the said eight Addenda hereto which are incorporated herein fully by reference thereto.

In addition, it is determined that when Officer Mark Eilrich appeared before the City Council on November 13, 1984, he did so in his capacity as an officer of the Riverbank Police Officers Association. It is also determined that Eilrich had no personal knowledge to support the four specific accusations (referred to as problems) contained in the statement which he read publicly to the City Council. So far

as Eilrich himself was concerned, his beliefs or feelings in reference to these matters were, for the most part, based upon hearsay, rumors, inferences, innuendos, and his own personal opinions.

RULES AND STATUTES

Section 1002 of the City of Riverbank Merit System Rules and Regulations provides that "Causes for disciplinary action any employee may include, but shall not be limited to, the . . . (*c*) Insubordination (*d*) Dishonesty . . . (*o*) Violation of the provisions of these working Rules and Regulations or departmental rules and regulations . . ."

Section 50 of Chapter 6 of Volume 1 of the City of Riverbank Police Department Manual entitled "Chain of Command" provides

> "The Chief of Police must necessarily limit the number of persons who report to him. Therefore to ensure unity of command, clearly defined lines of authority must be drawn so that there exists a structural relationship between each employee and the Chief of Police. Each employee must be aware of his relative position in the Department organization, to whom he is immediately responsible, and those persons who are accountable to him. Employees should strive at all times to operate within the chain of command and to keep their supervisors informed as to their activities. The Chief of Police will always be available to any member of the Department."

Chapter 11 of the City of Riverbank Merit System Rules and Regulations establishes Grievance Procedures and section 1101 provides: "Grievance procedures for employees are provided . . . (b) To afford employees individually or through qualified employee organizations a systematic means of obtaining further considerations of problems after every other reasonable effort failed to resolve them through discussion . . ."

In reference to Local Public Employee organizations as set forth in the Government Code, sections 3502 and 3506 provide

> *3502.* "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency."

> *3506.* "Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502."

In reference to Public Safety Officers, the Public Safety Officers Procedural Bill of Rights Act, as set forth in Government Code sections 3302(a) and 3304(a) provide, in part, that:

> *3302(a).* "Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity."

> *3304(a).* "No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure."

THE LAW

The first question that arises is whether the discipline of Officer Eilrich is prohibited by either section 3506 or 3304 of the Government Code. Obviously, Eilrich could not be discriminated against for participating in the

RPOA activities (Government Code sections 3502 and 3506). Likewise, he could not be subjected to punitive action for engaging in political activity (Government Code sections 3302 and 3304.)

Another question is whether Officer Eilrich's statements on November 13, 1984 constitute "political activity" within the meaning of the Public Safety Officers Procedural Bill of Rights Act. "Political activity" is not defined in the act. The Legislative history indicates that the intent was merely to give to police officers the same right to participate in local politics as other citizens possess. The sponsors of this legislation stated in a letter, dated July 25, 1975, addressed to the Senate Judiciary Committee, that "It was not our intent then, nor is it our intent now, to build legal loopholes or to protect Officers who are guilty of wrongdoing."

For the purpose of this discussion it will be assumed, without deciding, that Eilrich's appearance before the City Council on November 13, 1984 was a union or political activity within the meaning of Government Code section 3302 (a) and a participation in an employee organization within the meaning of Government Code section 3502. Hence, his union activity in representing the Riverbank Police Officers Association would be a protected one provided it was lawfully exercised. However, such activity gave Eilrich no greater protection than the First Amendment Constitutional guarantee of free speech, and so did not shield him from discipline for misconduct. "The mere fact that an employee is or was participating in union activities does not insulate him from discharge for misconduct or give him immunity from routine employment decisions." *Kerahadian Ranches v. Agricultural Labor Relations Board* (1984) 150 Cal. App. 3d 720, 736. (See also *Waterbury Community Antenna v. NLRB* (1978) 587 F. 2d 90, 98-99 for like rationale applicable to Government Code section 3502.)

If an employee in the public sector while engaged in union activity simultaneously commits an act of misconduct, then discipline may be administered by the public

agency. The "but for" test for private sector employees set forth in *Kerahadian,* supra, and in *Martori Brothers Distributors v. Agricultural Labor Relations Board* (1981) 29 Cal. 3d 721 is equally applicable to public sector employment cases. Compelling public interest justifies restraints on the exercise of Constitutional and statutory rights. *Ball v. City Council* (1967) 252 Cal. App. 2d 136.

The Constitutional right of free speech under the First Amendment is not absolute. *Hosford v. State Personnel Board* (1977) 74 Cal. App. 3d 302, 306. *Morton v. City of Santa Ana* (1971) 15 Cal. App. 3d 419, 426. *In Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal. 2d 499 the Court observed: "This court recognized the right of governmental agencies to preserve their harmonious operation by restricting such political activities as directly threaten administrative disruption or a loss of integrity (p. 511). . . . We have recognized that administrative disruption may ensue from the participation of a public employee in a campaign for or against his own superior and that the state may meet such danger by specific restriction (p. 508)."

A public employee has the right to make expressions of public concern. Hence, an employee's rights as a citizen must be *balanced* against the employer's concern in promoting the efficiency of public service performed through its employees. *Pickering v. Board of Education* (1968) 391 U.S. 563, 568. This balancing analysis was applied in *Connick v. Myers* (1983) 103 S. Ct. 1684 wherein Supreme Court Justice White stated, in part on pages 1692-1694, as follows:

> "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action . . . When employee speech concerning office policy arises from an employment dispute concerning the very ap-

> plication of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office . . . The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge therefore did not offend the First Amendment."

This public policy is noted with emphasis in many of the police officer First Amendment cases e.g. *Cook v. Civil Service Commission* (1960) 178 Cal. App. 2d 118, 134; *Hanneman v. Breier* (1976) 528 F. 2d 750, 754; *Kannisto v. City and County of San Francisco* (1976) 541 F. 2d 341, 343-344; *Waters v. Chaffin* (1982) 684 F. 2d 333, 336, 339; *Hosford,* supra; *Morton,* supra. "Thus, whether the restriction on speaking out is permissible depends upon a weighing of the ambient facts and circumstances surrounding each case. The permutations of those facts and circumstances may on balance tip the scale one way or the other (citations omitted). Significant state interests which must be considered are: maintaining proper employer-employee relations (citation omitted); whether the person involved is in a direct working relationship with the person affected by the publications, the effect on efficiency and harmony, the need for loyalty and confidentiality, and the effect on discipline (citation omitted); in police officer cases it is imperative that special emphasis be placed upon the paramilitary nature of police operations; the necessity of developing and maintaining discipline, morale, loyalty, confidentiality and efficiency of the force with view toward the proper protection of the public safety, which is the primary objective and function of a police department (citation omitted)." *Unruh v. City Council* (1978) 78 Cal. App. 3d 18, 24-25.

DISCUSSION

The next task is to apply the legal test to the facts. The first step is rather quickly determined. Officer Eilrich was not disciplined for participating in RPOA activ-

ities on November 13, 1984 at the City Council meeting nor for making statements at that meeting. He was disciplined for making statements which were considered to be false by Police Chief Remas. In this case there is a total lack of credible evidence linking Eilrich's protected RPOA activities to his discharge. Mere suspicion is not sufficient to sustain a finding that an employee's discharge was motivated by the employer's animus, if any, arising from the employee's protected activities. *Royal Packing Co. v. NLRB* (1980) 101 Cal. App. 3d 826, 835. To the contrary, Police Chief Remas had always recognized the RPOA, had suggested that it secure a professional to negotiate its Memorandum of Understanding with the City, and had freely facilitated its members to participate in its meetings and activities. The Chief had never placed any restrictions on the number or length of meetings during duty hours nor on the use by the police officers of the department's facilities and vehicular equipment for its activities.

The next step requires a determination whether the falsity of the statements constituted misconduct not within the protection of the First Amendment right of free speech. It is determined that, on balance, under all the circumstances and factors, Eilrich is not entitled to the protection of such Constitutional right when such right was not lawfully exercised, as the statements were false and were made wilfully, recklessly, and irresponsibly. It is difficult to find that Eilrich had a good faith belief in unsubstantiated and unconfirmed charges under such circumstances. *Unruh v. City Council*, supra, p. 25.

Serious positive allegations should never be made by anyone, much less by a police officer trained in securing evidence, without a good faith investigation to support his belief in the same. Here there was no examination of the court files to ascertain if traffic citations had been dismissed by the Chief until long after November 13, 1984. Yet traffic records of the court clerk's office are in the same building as the Police Department. Considering the dates of the citations which were dismissed (the last two in 1983—see Addendum re: Traffic Citations), this seems

like a rather "stale" and belated charge for a sincere public concern. Likewise, the charge of there being a "policy" of using power for "personal or political purposes" was so factually groundless that it is difficult to understand how it could have been made even in 1981 or 1982.

The same may be said for the "stale" and belated charge of misappropriation of public funds or time. A charge based on something allegedly occurring prior to March 1983, and which was unsubstantiated, could hardly be considered a matter of public concern in November 1984. Would not good faith require that one making such a charge also disclose his own attendance record (see Addendum-Misappropriation of Public Funds or Time)?

It would have been rather easy to interview and/or statementize the other police officers before making the job threat allegation. Such an investigation would have disclosed that only one officer stated that such a threat had been made to him, and a thorough interview with that officer and with Lt. McBride would have disclosed the total lack of evidentiary support for such a conclusionary statement (see Addendum—Job Threats).

Likewise, after the investigation by Mr. Paradis, there was a total lack of any effort to determine whether there was any credible evidence to support a continuing accusation involving criminal histories (see Addendum—Criminal Activity).

The utilization of political and media channels was most improper in the light of legally prescribed channels for persuing personnel and criminal complaints. If one were motivated solely for public concern re: criminal matters, then it would seem that a citizen, and in particular a police officer, would in confidence contact the Attorney General, the State Department of Justice, the Grand Jury, or the District Attorney. This was not done either by officer Eilrich, individually, nor by the Riverbank Police Officers Association. Furthermore, the City of Riverbank Merit System Rules and Regulations pertaining to Grievance Procedures are applicable under section 1101(b) to

the Riverbank Police Officers Association as well as to individual officers. Most, if not all, of the allegations, complaints, or accusations could have been handled through the use of such procedures. However, neither Eilrich nor the RPOA basically ever followed such procedures. Furthermore, these problems were not taken up or discussed with the City Administrator, who was ignored and bypassed.

Such comments by Officer Eilrich were directed against the Police Chief, his superior, with whom he worked in close frequent contact, they challenged the Chief's authority, they were disrespectful and discourteous of a superior, they had a disruptive influence on the Police Department's operation, they seriously affected morale and discipline within the Department, they were adverse to the maintenance of loyalty, confidence, and efficiency in the police force, and for quite awhile they interfered with the smooth operation of business within the City Hall. Such misconduct is incompatible with and inimical to the public service and the proper protection of the public safety.

In argument it was contended that Eilrich's termination was discriminatory in that the other RPOA members were not discharged nor otherwise disciplined. The case of *Rendell Mabey, Jr. v. Ronald Reagan* (1976) 537 F. 2d 1036 was cited as authority. However, the defense did not meet its burden of proof in support of such alleged disparity of treatment. It was Eilrich who alone deliberately phoned the Mayor on October 29, 1984 referring to information which might result in criminal charges against a department head. Furthermore, the specific contents of Eilrich's November 13, 1984 statement in the form in which he read it publicly and the time, date, and place of its reading, had not been approved by the Riverbank Police Officers Association membership, such as was the statement read by Officer Costin on October 22, 1984 which resulted in no disciplinary action.

THE TERMINATION GROUNDS

The City of Riverbank has met its burden of proof. The evidence not only preponderates, but it is also clear and convincing to a reasonable certainty, that Eilrich's willful, reckless, and irresponsible false statements constituted insubordination, dishonesty, and a discredit to himself and to the Police Department. There is nothing vague or ambiguous in these terms which are well defined in any standard dictionary.

In conclusion, cause for disciplinary action exists in that it is determined:

1. That Eilrich's conduct was insubordination within the meaning of section 1002(c) of the City of Riverbank Merit System Rules and Regulations; and

2. That Eilrich's conduct was dishonest within the meaning of section 1002 (d) of the City of Riverbank Merit System Rules and Regulations.

It is exceedingly questionable whether Eilrich's conduct could be a valid cause for discipline in failure to follow chain of command. If he had acted personally, rather than as a representative of the RPOA on November 13, 1984, then there would be no question that he violated the chain of command within the meaning of Section 50 of Chapter 6 of Volume 1 of the City of Riverbank Police Department Manual. However, Eilrich appeared as a representative of the RPOA, which employee organization had been instructed through Costin, its President, and Eilrich, its Secretary-Treasurer, to use the grievance procedures i.e. chain of command. The Grievance Procedures are applicable to the RPOA as well as to the individual officers (section 1101(b)), Merit System Rules and Regulations. Hence, the City of Riverbank has failed to meet its burden of proof as to this ground for termination. However, this does not affect the discharge on the other two grounds for termination.

THE DISCIPLINE

The next question then is whether the punishment imposed is commensurate with the offense or whether a lesser discipline should be considered. In *Arnett v. Kennedy* (1974) 416 U.S. 134, the Supreme Court approved a balancing test, weighing the government's interest in removing an unsatisfactory employee against the interest of the affected employee in continued public employment. It is indeed unfortunate that legal advice, as recommended by Lt. McBride, was not sought in this matter. However, Eilrich's conduct, attitude, and thinking process completely destroys any possible working relationship with Police Chief Remas hereafter. From Eilrich's testimony it seems that he is uncertain whether he could go back to work if Remas was still the Police Chief. He testified that he feels resentful towards the Police Chief, that he is not sure how he could deal with the Chief, that he questions whether his career would suffer upon reinstatement, that he has some doubts, fears, and concerns, that he would feel animosity towards his employer, and that he would try to be objective but that it would be difficult. One can only conclude that were he to be reinstated, after a period of suspension or otherwise, his attitude and disrespect are likely to continue and be repeated to the ultimate harm of the public service. *Fout v. State Personnel Board* (1982) 136 Cal. App. 3d 317, 321; *Schmitt v. City of Rialto* (1985) 164 Cal. App. 3d 494, 504.

In addition, the Police Chief testified, in effect, that Eilrich could no longer be an effective Officer with the Riverbank Police Department, that his failure to follow appropriate rules by publicly making false accusations indicates his unwillingness or inability to obey his superiors, that the Chief could never trust him again because of his dishonesty, and that the gravity of the consequences to the Police Chief, the Police Department, and the Riverbank City Council could only result in the discipline of termination. In *Cook v. Civil Service Commission*, supra, at page 134, the Court stated that:

"... it is apparent that the incident related in charge 2, under the title of 'insubordination' and the incident related in charge 3 under the title of 'misconduct,' occurring on the same day, constituted parts of a general course of conduct. Whether one sentence uttered, or one offensive act committed, segregated and by itself, constitutes insubordination or misconduct is of no consequence if the charges as a whole constitute a course of conduct amounting to insubordination or misconduct. The appointing officer and the civil service commission were entitled to conclude that the attitude of petitioner toward the chief of police, his evident animosity, and his bitter, discourteous, abusive, disloyal, threatening and profane expressions of ill will were such as to make his continued employment detrimental to the city; that his conduct constituted a rebellious challenge to the authority of his superior officer which, if tolerated, could have been nothing but devastating; and that the natural consequence of such a state of affairs would be a deterioration of the morale of the department, disruption of harmony and resultant inefficiency of the police force. These factors legally justified petitioner's dismissal for insubordination and misconduct."

Consequently, the dismissal upon the grounds of insubordination and dishonesty is upheld. It is deemed most appropriate considering all the circumstances and factors involved.

DATED: April 28, 1985.

/s/ Jean Morony
Judge Jean Morony, Retired
Hearing Officer

cc: For the City of Riverbank
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ADDENDUM #1—CHRONOLOGY OF EVENTS

It is necessary to bear in mind the chronological sequence of certain events in order to perceive the same in proper context.

May 13 or 14, 1984. Officer Costin, President of the RPOA, met in the City Council chambers with Mayor Neal and Councilman Porter. The meeting was immediately following the RPOA's letter of non-attendance at the Employees Appreciation Dinner. Costin stated that the RPOA wanted the City Council, rather than the City Administrator, to be the final step in the disciplinary procedure. Neal and Porter declined to discuss Officer Doe with Costin because it was a personnel matter.

June ?, 1984. Police Chief Remas met at the Locust North Restaurant with members of the RPOA. There was a very wide range of matters discussed e.g. Officer Doe, traffic citations, disparate treatment, safety of officers, and morale in general. The next day the Chief started an Internal Affairs investigation of Officer Doe. The RPOA had taken a no-confidence vote concerning Officer Doe. It was probably at this meeting, or prior thereto, that the Chief had suggested the RPOA should secure a professional to assist it in negotiating a Morandum of Understanding with the City Administrator.

July ?, 1984. Several weeks after the June meeting with the Chief, Officer Costin invited Mayor Neal to an RPOA meeting. The Mayor attended such a meeting. At this meeting there was a general discussion concerning

the morale within the police department and the current negotiations with special attention to the grievance procedures. Again the Mayor declined to discuss Officer Doe, as it was a personnel matter.

July 27, 1984. The Memorandum of Understanding between the City and the RPOA was signed subject to ratification by the RPOA members within 10 days and by the City Council within 20 days. This concluded the negotiations which had started in May.

August ?, 1984. By this time it was known that the Chief had recommended Sergeant Lyons be demoted to Police Officer. The RPOA had a meeting at which it was informally decided to give the City Administrator a chance to make a decision, but if Lyons was demoted then the members would attend the next City Council meeting.

October 20, 1984. Officer Eilrich telephoned Officer Costin and advised him that Lyons had been demoted. At the appeal hearing Costin denied knowing on October 20, 1984 that the demotion would be effective on October 26 or 27, 1984. However, Costin told Eilrich to call an emergency meeting of the RPOA for October 22, 1984.

October 22, 1984. The RPOA held an emergency meeting, triggered by Lyons' demotion, at the Locust North Restaurant. All eight members were present. A no-confidence vote in the Chief was taken for various alleged reasons e.g. disparity of treatment between Lyons and Doe, the treatment of officers, and disrespect and lack of support of the officers. Lt. McBride was contacted and advised that the RPOA would attend the City Council meeting that night. McBride requested that the same be deferred for several weeks until the Chief returned from an emergency trip to New York because of his mother's death. The request was denied.

Later the same day all the members of the RPOA, except Officer Bennett who was on duty, attended the City Council meeting (one officer arrived late). Officer Costin, as President of the RPOA, read a statement to the

City Council requesting to meet in Executive Session with the Council to discuss problems affecting the Police Department. The request was denied, and they were requested to follow the grievance procedures in the Merit Rules and Regulations.

After the Council meeting all the officers present then went to the Riverbank News and discussed this matter with its reporter. They stated that earlier that day the RPOA had unanimously voted a lack of confidence in the Police Chief; however, this vote was not disclosed to the City Council at its meeting earlier that night.

October 26, 1984. The RPOA had another meeting. It was indicated that the members wanted the Police Chief replaced as being unfit for the job. A second no-confidence vote of the Chief was taken. However, this time it was not unanimous. Apparently, it was at this meeting that Costin, as President, and Eilrich, as Secretary-Treasurer, were authorized (informally without actual formal vote being taken) to be the spokespersons for the RPOA, and to take whatever action they deemed necessary, without having to contact the RPOA members each time, to express the concerns of the RPOA about the Police Department.

October 29, 1984. Officer Eilrich telephoned Mayor Neal at his home concerning possible criminal charges against someone in the Police Department but disclosed nothing further. By letter, dated November 1, 1984, the Mayor advised Eilrich to furnish to the District Attorney any information concerning criminal matters (apparently this was never done). Once again the Mayor reminded Eilrich that the City Council directed him as well as the other RPOA members to follow the grievance procedures. About a week later Officer Costin, in uniform, visited the Mayor at his home to advise that the RPOA was not out to harm the City Council.

November 3, 1984. When the Chief returned from his mother's funeral in New York, he had contacted Officer Costin to find out what was behind the October 22, 1984 presentation to the City Council and requested Costin to

arrange a meeting of the RPOA with him to discuss the same. A meeting was set for November 9, 1984. On November 8th the Chief rode around with Costin seeking to ascertain why the RPOA had taken a no-confidence vote. Costin declined to discuss with the Chief the concerns of the RPOA or any of its complaints about the Police Department.

November 9, 1984. The Chief met with members of the RPOA in the briefing room of the Police Department. Eight members were present and one was absent. There was a wide range of subjects discussed. Apparently nothing was resolved except the Chief's agreement to discuss traffic citations with the officers issuing the same before he made any decision to request a citation's dismissal. Likewise, there is evidence that prior to this meeting it was the general consensus of most of the RPOA members that the Chief should be fired.

November 13, 1984. Officer Eilrich, accompanied by three other officers, attended the City Council meeting, at which time he read a statement concerning the Police Department and making certain positive allegations of misconduct against the Police Chief. The Police Chief was out of town and had not been informed that this matter was to be presented on November 13, 1984. With the exception of those officers then present (and perhaps one other), the remaining members of the RPOA were unaware that Eilrich was going to make a statement that night, nor were they aware of the specific statement to be made.

November 14, 1984. Mayor Neal wrote a letter to Officer Mark Eilrich, Riverbank Police Officers Association, reminding him that the grievance procedures had not been followed, and that the City Council expected the Merit System Rules and Regulations to be followed by all city employees, including police officers.

ADDENDUM #2—
CRIMINAL INVESTIGATIONS—ETHICS

Item 1 of the November 13, 1984 statement to the City Council is as follows:

"A former member of this police department transferred to another law enforcement agency at a time he was the subject of criminal investigations conducted by this department. It is our belief as professional peace officers that for this to occur would probably necessarily have involved a failure of ethical responsibilities in background investigation activities and the selective process."

This allegation refers to Officer Doe who had applied for a position with another police agency, which sent an investigator to develop background information on the applicant. Obviously, it was the responsibility of the other agency to make whatever background investigation it deemed necessary. The contention was advanced that Police Chief Remas was unethical in not affirmatively disclosing certain unsubstantiated information to the background investigator. Obviously, Chief Remas had no responsibility to make such an investigation for the other agency. However, pertinent information was disclosed. Furthermore, there is no evidence that the background investigator was limited or restricted in any way in conducting the investigation or in interviewing anyone. There was no "cover up" by the Chief. It was a judgmental decision whether affirmatively to disclose unsubstantiated matters either already investigated or still in the course of investigation. On July 16, 1984 Officer Doe submitted his resignation effective August 1, 1984.

At the approximate time referred to in item 1 there were three Internal Affairs investigations and one criminal investigation concerning Officer Doe which either had been completed or were pending.

1. *File IA 84-007.* A reserve officer had complained that Officer Doe had solicited his cooperation in seeking a vote of confidence from the members of the Riverbank Police Officers Association. This June 1984 file became moot when Officer Doe resigned.

2. *File IA 84-006.* Officer Doe and another officer separately responded to a lady reporting a prowler. Subsequently the lady received several phone calls allegedly from the Riverbank Police Department making some inquiries about one of the officers who had responded to her call that night. Apparently the caller was interested in arranging a social date with the lady. This investigation was an attempt to determine the identity of the caller, as Officer Doe was a suspect. The identity of the caller was never established. The lady never mentioned that the calls were obscene, harrassing, or annoying, although at least one of the calls was at an unusual hour. The lady stated that the caller had an "Okie" voice with a strong southern accent. Officer Doe did not have a voice that fit this description. This investigation pertaining to Officer Doe was suspended upon his resignation, as there was no proof concerning a possible PC 653m violation by Officer Doe, who specifically denied to Lt. McBride that he ever made such calls.

3. *Files 84-0116 and 84-0117.* This investigation concerned a false report made by Officer Doe in connection with a burglary. This is not a case where a false report was originally made and only later discovered to be false. It was known to be false from its inception. Officer Doe had located some of the items stolen in the burglary and so reported to Officer Copeland, who was the investigator. Copeland testified that Officer Doe told him he had gotten the information concerning the stolen property from one of his narcotic informants. Copeland told Officer Doe to put it down correctly in his report. However, he did not do so, but instead related a story involving a dog.

Copeland further testified that he did not go to the Chief about this because he had already spoken to Officer Doe, and he thought that Officer Doe had also spoken to Lt. McBride. All of this occurred prior to Copeland's taking the investigative report to the District Attorney's office to seek a burglary complaint. What is difficult to understand is why Copeland took the report to the District Attorney's office in the first place, knowing that Officer

Doe's written report was contrary to what Doe had told him. Certainly the Chief should have been informed at that point rather than later. However, Copeland orally told the District Attorney's office about the falsity of the "dog story" and about what Officer Doe had reported to him about this matter. The District Attorney's office instructed Copeland to return and get a correct report.

When the matter was brought to the attention of the Chief, he immediately admonished Officer Doe that such conduct was unacceptable, told him to redo the report correctly, and then for it to be resubmitted to the District Attorney's office. This was done, but the District Attorney's office declined to prosecute unless the identity of the confidential informant was disclosed.

Officer Copeland related another instance involving this particular burglary. He testified that he had received a telephone call from an unknown informant who advised that he/she knew about the Jackson Street burglary and the taking of a dishwasher and toilet. Copeland further testified that this caller was not the same as Officer Doe's informant because he was familiar with Doe's informant's voice. However, Copeland did not disclose to the District Attorney's office about having received this call from an unknown informant.

It was a departmental decision not to disclose the identity of Officer Doe's confidential informant. Doe had developed two such informants, and no one else in the police department had done so. Such informants are necessary to secure information concerning suspects which police on the street are unable to obtain. This informant had supplied information previously which had resulted in arrests in two cases. Some informants are willing to go to Court to testify while others are not, because sometimes disclosure of an informant's identity leads to intimidation, beatings, and disappearances. Hence, in this case it was determined to protect the identity of the confidential informant.

The District Attorney's refusal to prosecute was because of the non-disclosure of the identity of the confiden-

tial informant and not because of the initial false written report concerning how the dishwasher and toilet were located. The stolen property valued at some $600.00 was returned to its owner.

Although Officer Doe was admonished, he was not otherwise disciplined. Likewise, earlier Officer Eilrich had not been disciplined for improper conduct. On December 19, 1983 Eilrich assisted a Stanislaus County Sheriff's Detective in the search of a Riverbank residence. The Detective became suspicious that Eilrich was hiding something under his coat. Eilrich testified that he lied when questioned that day by the Detective, as he had in fact wrongfully removed an address book from the residence during the search. The Detective was suspicious of Eilrich's conduct, and on December 21, 1983 he contacted Officer Copeland to whom he related his suspicions. On December 27, 1983 Eilrich advised the Detective that he had taken an address book in order to obtain some names, that he had made copies of pages from the book, and then had discarded it. Eilrich was advised by the Detective that his actions possibly could compromise the case.

4. *Narcotics File.* This file involves a criminal investigation as distinguished from the preceding Internal Affairs investigations. On June 11, 1984 Officer Sauls reported to the Chief that a juvenile in the detention facility had accused Officer Doe of certain narcotic activity. This juvenile had been wanted for about one year on warrants of the Riverbank Police Department. The Chief immediately started an investigation, and brought Lt. McBride back from vacation to conduct it. Lt. McBride made a thorough investigation not only of the juvenile's accusations but also other suspicious and rumored reports concerning Officer Doe. The various allegations included the giving of narcotics to others, the using of narcotics, the removal of narcotics from the evidence locker, and the failure to arrest anyone from whom he allegedly took narcotics. None of these allegations was ever substantiated.

A question arises as to what is meant by "ethical responsibilities" as used in the item 4 of the November 13, 1984 statement. No evidence was adduced in this respect except personal opinions. Obviously "ethical" pertains or relates to ethics. A common definition of "ethics" is "the basic principles of right action." It appears that the Police Chief took the appropriate and right action in these matters.

Consequently, it is determined that there was no failure of any ethical responsibility by Police Chief Remas.

ADDENDUM #3—TRAFFIC CITATIONS

Item 2 of the November 13, 1984 statement to the City Council is as follows:

"Over the past several years it has been the policy of the Chief of Police to cause dismissal of traffic citations 'in the interest of justice.' This practice is an unethical use of the Chief's power for his own personal or political purposes."

In support of this allegation only twenty (20) such traffic citations were submitted. However, the first one 3-2876, dated 1-21-81, was dismissed on 1-29-81 at the request of Sergeant McBride because the issuing officer Mark Eilrich failed to write 14610CVC on the "fix-it" citation. The remaining nineteen (19) citations were dismissed by the Court at the request of Police Chief Remas. It is interesting to note that three (3) were issued in 1981, fourteen (14) citations in 1982, and only two (2) in 1983. A further analysis of these citations shows that ten (10) involved so-called "angle" parking, five (5) involved other types of parking violations, and the remaining four (4) involved so-called "moving" or "personal appearance" citations which go onto a person's DMV record.

The Chief testified at length concerning each of these citations. There is no need to discuss each one at this time. However, there are several which should be mentioned, namely:

C-2236 (1-23-83)—Mistakenly issued for no license by officer to a person on active military duty. I have considered this one of the moving violations, which is perhaps improper to do.

C-2553 (6-27-83)—This was issued to the Chairman, Housing Authority for the City of Riverbank, for parking in a red zone when he had responded in his personal car to an emergency call and there was no other immediate parking space available.

B-4416 (1-30-82)—This was issued at 0335 hours for parking on wrong side of road in front of violator's own home. The father and son had washed the family cars in the cul-de-sac, and son forgot to repark car in driveway. Traffic was not impeded and there was no unsafe hazard.

C-1046 (10-1-82)—This was issued to a long-time school bus driver for parking his pickup not within 18 inches of curb in a loading zone. Previously this had been a loading zone for school children, but had been abandoned several years before and the zone moved 100 feet to 200 feet west of where the citation was issued. However, the paint had not been removed, and it should have been painted for angle rather than parallel parking. The driver had been parking his pickup truck in this location for several years, and would leave it there while he went to drive the school bus.

C-1253 (10-1-82)—This was issued to a volunteer fireman who responded to an emergency call and parked his car hurriedly more than 18 inches from the curb by the Fire Station when he jumped onto the fire truck. When he returned from the fire, he found the citation and gave it to the Fire Chief.

C-1246—This was issued, on the Sunday of the Wine and Cheese Festival, to a lady for blocking her own driveway. The day before, she could not get out of her own driveway to get to a doctor because someone else had blocked her driveway; so the next day she blocked her own driveway so she could get her car out when needed.

During a period in 1982 there was a controversy regarding diagonal versus parallel parking within the City of Riverbank, as apparently the City Council was having some difficulty in resolving the matter. The Chief asked his officers to bear this in mind and use their discretion when appropriate. The remaining ten citations fall into this category, and the Chief requested dismissals of the same for this reason.

There are left to be discussed the remaining three (3) citations which are referred to as moving violations, namely:

B-2348 (9-20-81)—This was issued to the driver of a canning company truck. Part of the citation was in the category of a "fix-it" ticket; the other part was because it was a Peterbilt truck and the operator was driving out of classification. The driver had been directed by his employer to pick up the truck and return it to the company's facility for repairs. If the "operating outside of classification" had remained, then the employee would have been penalized for complying with his employer's directive.

B-3327 (9-22-81)—This was issued to a local businessman (no personal friend of the Police Chief) for failure to stop at a stop sign and having no DMV license in possession. The citizen, while not denying the violation, was extremely upset and angry. He complained to the Chief that the young officer, who had been on the police force only several months, was very pushy, rude, and arrogant. The Chief did not want to start an Internal Affairs investigation resulting perhaps in the discipline of a young officer starting a law enforcement career. The citizen withdrew any personnel complaint against the officer, the Chief requested a dismissal, and he then counseled the young officer who satisfactorily accepted the verbal admonition and thus avoided having it in his permanent personnel records.

3-3584 (10-24-81)—This was issued to an official of a local bank for speeding and having no DMV license in possession. She made a complaint to the Chief concerning

the conduct of the young officer, while not denying the violations. The Chief was of the belief that the young officer desired and wanted to do a good job, and he again was reluctant to start an Internal Affairs investigation perhaps with resulting discipline for a young officer which would become a part of his permanent personnel record. In order to avoid having the citizen file a formal complaint against the young officer, the Chief requested dismissal of the speeding ticket but not the portion pertaining to no DMV license. The Chief then counseled the young officer.

There were several other matters testified to in respect to traffic citations. However, the Chief was not involved in any of these citations.

Much mention has been made of a citation issued for a car parked in the zone for handicapped persons in front of the City Hall. The date was never established. Later it was learned that the car had been parked there by a city employee who worked in the City Hall. The employee had to leave work to go to a doctor and, upon her return, there was no other place to park. The testimony showed that it was the busiest Monday ever for the Municipal Court, held in the City Council chambers, which was in session until after 2 p.m. that day. The employee discussed the matter with Lt. McBride, who investigaged it. McBride then discussed the matter with the officer who had issued the citation, and who wanted to know if McBride was going to take care of it. The officer stated that he didn't care one way or the other what McBride did with the citation. He further stated that if he had known who the car belonged to, he probably would not have issued the citation but would have contacted the employee to tell her either to move the car or he would have it towed. McBride testified that in his more than four years in Riverbank he had never seen any handicapped person park in this particular handicapped zone nor, for that matter, had he ever seen any handicapped person driving within the City of Riverbank. Lt. McBride voided the citation and only much later was the Chief ever informed about it.

There was also some testimony, very limited in scope, about three parking citations being issued for parking in a No Parking zone on the eve of the 1983 high school graduation. The officer who issued the citations testified that they were voided by Officer Doe, that the Police Chief had nothing to do with the same, and that he never mentioned the same to the Chief.

Lastly, it should be mentioned that two citations, B-0076 (1-29-80) and B-1927 (5-20-31), which were issued by Officer Eilrich were voided by Sergeant Lyons.

There is absolutely not one iota of credible evidence that Police Chief Remas ever caused traffic citations to be dismissed "over the past several years" prior to November 13, 1984, or at any other time prior thereto, "for his own personal or political purposes." There were valid reasons, in the exercise of his good judgment as Police Chief, for the request to the Court to dismiss the some nineteen citations out of an estimated 5,000 or more which had been issued during the same period.

Consequently, it is determined that the item 2 statement was neither accurate nor factually correct.

ADDENDUM #4—MISAPPROPRIATION OF PUBLIC FUNDS OR TIME

Item 3 of the November 13, 1984 statement to the City Council is as follows:

"There has been a misappropriation of public funds or time by favored members of the Police Department. Although this was brought to the attention of the Chief of Police, no action was taken."

Prior to March 15, 1983 supervisory personnel in the Police Department were not required to fill out request forms for approval of overtime. The Police Chief relied upon the integrity of the supervisors (i.e. the Sergeants) because they do not receive any monetary pay for overtime such as other police personnel do but only compensatory time off if and when allowed. However, on March

7, 1983 Sergeants McBride and Lyons brought this matter to the Chief's attention and, in particular, for the first time, complained about the number of overtime hours Officer Doe had accumulated.

The Chief made an immediate investigation. There was no way to audit whether Officer Doe actually had worked all the overtime hours claimed by him. On the other hand, there was no evidence substantiating the charge that Officer Doe had illegally claimed overtime for hours not actually worked. However, the Chief took prompt corrective action to avoid any further question in this respect. On March 15, 1983 the Chief put out a Memorandum to all Police Personnel requiring everyone, including supervisory personnel, to complete a "time slip" form when requesting approval of overtime and for compensatory time off. Thereafter, all personnel complied with this procedure.

The charge of misappropriation of public funds is rather tenuous. There was never any evidence presented, or even hinted at, that the Police Chief had ever misappropriated any public funds. The reasoning behind such a statement is that if an officer is allowed compensatory time off for alleged overtime hours never worked, then the city is paying another officer to work in his place during his time-off period. There was no evidence adduced to support this theory, so far as it involved Officer Doe, with the exception of one four-hour incident when another officer was called back to work. Officer Doe worked narcotics. There was no evidence that such a duty assignment did not, of necessity, entail some overtime hours. In any event, when Officer Doe left the department, he lost 250 hours of overtime for which he received neither compensatory time off nor any monetary pay.

On the other hand, there was evidence to support this theory in reference to Officer Eilrich (although item 3 obviously was aimed at Officer Doe, as was brought out in testimony at the appeal hearing). During the period from November 10, 1982 to December 3, 1983 Eilrich used an excessive amount of sick leave and repeatedly reported

late to work. Between July 11, 1983 and December 3, 1983 he reported late 48.6% of the days he worked, and for which he was reprimanded.

Consequently, it is determined that the item 3 statement was neither accurate nor factually correct.

ADDENDUM #5—JOB THREATS

Item 4 of the November 13, 1984 statement to the City Council is as follows:

"Since our attendance at the last council meeting and resulting local publicity, members of our association have been threatened with job action if they persisted in communicating with the media. This is a perfect example of the atmosphere of fear and mistrust that is pervasive in this department."

The record is completely devoid of any evidence that Police Chief Remas ever threatened, either directly or indirectly, and either expressly or impliedly, anyone concerning his or her job. With one exception, the only evidence consisted of hearsay and rumors among some of the officers that they had either heard or been told that Officer Copeland had been so threatened. The exception is that Officer Copeland so testified. Hence, it is necessary to examine the testimony to determine upon what he based his opinion in this respect.

Officer Copeland testified that on October 31, 1984 (which was approximately one week after the October 22nd Council meeting and the October 24th article in the Riverbank News) he approached Lt. McBride at a restaurant and informally sought his advice concerning problems in the Police Department. McBride told Copeland that he had no quarrel with the police officers and the Riverbank Police Officers Association airing their problems, but that they were not moving in the right direction to solve any problems. McBride indicated that he thought what they were doing might be contrary to law. He pointed out that there were grievance and other procedures available, and to work within the system. He en-

couraged participation in the RPOA and urged it to secure the services of an attorney or to contact PORAC for help and legal advice. McBride further indicated that there would be no repercussion if they proceeded in a legal manner; however, disciplinary action is always possible if rules and regulations are continually broken or illegal action taken. Copeland stated that the officers were upset because the department was not run the way it should be. McBride indicated that things are run by the book, although he hoped not too strictly nor technically. McBride inquired of Copeland what was to be gained by going to the news media other than to embarrass the City Council and the Police Chief throughout the county. McBride specifically denies saying that anyone would be terminated if he or she went to the papers. When Copeland indicated that the Chief wouldn't fire everyone, McBride pointed out that the city could be covered by the Sheriff's Department. Copeland confirmed McBride's testimony that at least twice McBride specifically stated that nothing he said was any kind of a job threat.

In the light of what actually transpired, it is difficult to understand how Copeland could interpret his solicited conversation with McBride for advice as any kind of a job threat. In fact there was no job threat at all. McBride gave him some good advice—to seek legal help and proceed properly. Later, Lt. McBride talked with Officer Costin, in the afternoon out back of the Police Department building, and advised him that the officers should get an attorney. Meanwhile, McBride offered to act as a mediator between the Police Chief and the Riverbank Police Officers Association.

At the appeal hearing some testimony was presented that a few officers felt somewhat intimidated when the Police Chief conducted Internal Affairs investigations seeking to ascertain the involvement, if any, of the officers concerning the November 13, 1984 statement to the City Council. However, these interviews were conducted *after* November 13, 1984 (occurring on November 16 and 21, 1984). Hence, anything occurring after November 13,

1984 could not possibly be encompassed within the subject of item 4, which refers to the period from October 22 to November 13, 1984.

Consequently, it is determined that the item 4 statement was neither accurate nor factually correct.

ADDENDUM #6—CRIMINAL ACTIVITY

On the evening of October 29, 1984 Officer Eilrich telephoned Mayor Charles E. Neal at his home and stated to the Mayor that he had information which he believed might result in criminal charges against one or more department heads. The nature of such information was not disclosed to the Mayor.

Apparently the basis of such a statement is the allegation that Police Chief Remas was illegally furnishing criminal histories to non-authorized personnel. Teresa Gasca testified that on two occasions the Chief asked her to run a criminal history—one occasion was last year and the other occasion could have been in 1983. She has no further recollection of the earlier incident. However, she recalls that on the last occasion the Chief handed her a paper containing a name and a birthdate and asked her to run a criminal history. She did so, but she cannot recall if anything, at all came back on it except perhaps a driver's license. She does recall that she ran a DMV check because she asked the Chief for the name of a city, and she stated that such city name information is not necessary for a criminal history inquiry. She gave the print-out to the Chief, and she saw him walk across the street to Mr. Boston's bank. She then telephoned the Department of Justice in Sacramento to inquire if it was legal to disclose such information to a banker. Upon being advised that it might be illegal, she then reported this incident to her supervisor Sergeant Lyons.

Mr. Dick Paradis, Jr., the head of the Criminal Records Security Unit, Department of Justice, then received a phone call from a male (later identified as being Sergeant Lyons) reporting that maybe the Riverbank Police Chief was furnishing criminal histories to a banker. Mr.

Paradis then made a personal investigation, because it is a criminal offense to furnish criminal histories to unauthorized persons. The rules for the use of such histories, for the auditing of the same, and for the training of law enforcement agencies were all written by Mr. Paradis. His investigation revealed no evidence of any violation by the Chief.

In May or June 1984 the Chief had started an investigation for the bank concerning a bounced check causing a $450.00 loss to the bank. The investigation was turned over by the Chief to Officer Copeland. Several years before, the Police Department had investigated the forgery of a $4,000.00 check involving the same bank. The Chief is not a customer of Mr. Boston's bank.

Mr. Boston unequivocally denies seeing or receiving any criminal histories from the Chief. The Chief unequivocally denies ever permitting any unauthorized personnel either to read or receive any criminal histories. The investigation by Mr. Paradis confirmed that there had been no unauthorized dissemination of criminal histories by the Chief.

Consequently, it is determined that the October 29, 1984 statement to the Mayor by Eilrich was neither accurate nor factually correct.

ADDENDUM #7—GRIEVANCES

In the November 13, 1984 statement to the City Council it was reported that "It has been our experience in the past when we have initiated grievance procedures that there has been no productive results." In addition, Eilrich testified that the City's grievance procedures were unworkable, futile, and frustrating.

During the tenure of Police Chief Remas there have been filed only two (2) formal grievances, namely:

1. On February 20, 1984 Officer Sauls filed a written formal grievance concerning military leave. However, on February 24, 1984 Officer Sauls filed a written with-

drawal of the formal grievance stating that he found he was in error.

2. On February 18, 1984 Officer Bennett filed a written formal grievance concerning Officer Doe's having requested him to return to work. Bennett believed that Doe had lied to him about Doe's own work schedule that day. Police Chief Remas made an investigation, and on March 19, 1984 submitted a written investigative report to the City Administrator. On March 27, 1984 the City Administrator advised Bennett that it was not possible to substantiate the contention that Officer Doe had "lied" to him. However, Officer Doe was admonished regarding the approval procedure for taking compensatory time and his use of poor judgment in this incident. City Administrator Robirds testified that Bennett expressed no dissatisfaction with the handling of the grievance, and stated that he didn't know that Robirds could have done anything more than was done. Officer Bennett testified that at the time, he didn't think the grievance was properly taken care of but that now he is of the belief that it was handled all right under the circumstances.

There were several other matters brought out in the testimony, some of which might be classified as informal grievances, namely:

1. In October 1981 it was reported that Officer Doe was going in a marked police car to a mobile home park outside the city limits. The Chief interviewed Doe, accepted his explanation, but advised him to cease doing so. However, other officers have taken city vehicles outside the city for meals and no one has been disciplined for it.

2. On March 7, 1983 Sergeants McBride and Lyons contacted the Chief about Officer Doe's overtime hours. The Chief started an investigation (IA 33-004). See Addendum hereto entitled "Misappropriation of Public Funds or Time."

3. On March 13, 1983 Officers Sauls and Hedrick sent a Memo to the Police Chief relating a series of events

and voicing concern for their safety when Doe either could not be reached by radio or was slow in responding when he was reached. Specific mention was made of Doe's failure to show up at a traffic accident. The matter was investigated and it was questioned whether a back-up was necessary with two Riverbank police officers, a CHP officer, and a fire truck Chief on the scene.

4. On February 20, 1984 Officer Sauls sent a memo to the Police Chief about the Chief's not assisting him as a back-up in a particular situation. The Chief replied that he would discuss this matter in private with Officer Sauls in the presence of Saul's supervisor. However, Sauls did not follow through on this matter.

5. On March 28, 1984 City Administrator Robirds directed a Memorandum to Police and City Hall Personnel advising that the City Council had directed City day-time employees to use the off-street parking facility for their private vehicles. The merchants had complained about such vehicles being parked in front of their businesses when the stores were open. On April 10, 1984 Officer Costin, as President of the RPOA, replied by Memorandum that the officers intended to continue to park as in the past. There was an oral reply that the Council had taken steps to acquire additional land for City employee parking. It is difficult, however, to understand the attitude of the police officers in refusing to comply with the request to use off-street parking to assist and cooperate with the merchants.

6. On May 17, 1984 Officer Costin, as President of the RPOA, sent a Memorandum to City Administrator Robirds advising that members of the Riverbank Police Officers Association would not be attending the City Employees Appreciation Dinner. Apparently, the RPOA had expected a formal reply to their memorandum objecting to parking in the off-street parking area for city employees. It is difficult to understand how this communication could be considered a grievance although Eilrich testified at the hearing that it was in effect a "protest" or "grievance." The most that can be said for the May 17, 1984 Memoran-

dum is that the RPOA desired an open meeting with the City Council to discuss undisclosed issues rather than following the procedures established by the Merit System Rules and Regulations.

No formal grievances were ever filed by the Riverbank Police Officers Association and only two were filed by individual officers. It is also apparent that in several instances (e.g. the parking and appreciation dinner) there is a lack of understanding of the procedures for informal grievances.

Consequently, it is determined that there has been an inadequate initiation of formal or informal grievances to warrant any conclusion that such procedures are non-productive, unworkable, futile, or frustrating.

ADDENDUM #8—STRONG AND VIABLE ORGANIZATION

In the statement read to the City Council on November 13, 1984 it is stated "Chief Remas has recently commented in the local news media, in response to our publicly made unanimous 'no-confidence' vote of his management practices, that it is his belief that the Riverbank Police Department is currently a strong and viable organization. It is our equally strong belief, as the actual members of the organization of which he is describing, that his contention is simply false."

The evidence clearly indicates that there was a morale problem, rightly or wrongly, within the Police Department. In this context it was not a strong and viable organization. However, there has been no showing that the Police Department was not properly discharging its responsibility to the City of Riverbank as its law enforcement agency. In this respect it was a strong and viable organization.

Whether such statement was true or false seems immaterial. What is important is that it was made publicly, and to that extent it could only contribute to making the situation, whatever it was, worse.

Consequently, it is determined that such public statement affected the Chief's authority in administering the police organization.